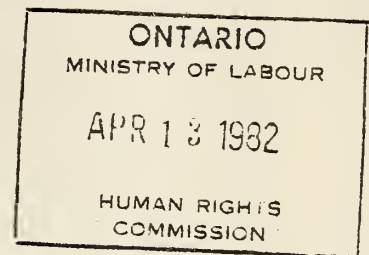


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v



The Ontario Human Rights Code, R. S. O.

1980, C. 340

IN THE MATTER OF:

The complaint of Ms. Rosanna Torres, of Toronto, Ontario, that she was discriminated against by Royalty Kitchenware Limited and Francesco Guercio, 1683 St. Clair Avenue West, Toronto, Ontario by reason of being dismissed from employment or being refused continuation of employment and/or by reason of a term or condition of her employment, because of her sex, contrary to paragraphs 4(1)(b) and/or (g) of the Ontario Human Rights Code, R. S. O. 1980, C. 340.

A HEARING BEFORE:

Peter A. Cumming, a Board of Inquiry appointed under the Ontario Human Rights Code by the Honourable Robert G. Elgie the 29th day of June, 1981.

1. The first part of the paper
 discusses the general principles
 of the theory of the
 subject. It is divided into
 two main sections: the
 first section deals with the
 general principles of the
 theory, and the second
 section deals with the
 application of the theory
 to the subject.

Decision and Order1. Preliminary Point - Respondents' Right to an Adjournment and Right to Counsel

At the commencement of the hearing, the Respondents' requested an adjournment, suggesting that due to problems in obtaining counsel, the hearing should be adjourned. The request was denied because there was no doubt that the Respondents had no real excuse for not being prepared to proceed and for then being without counsel. A good deal of time was spent considering Respondents' request for an adjournment. At the conclusion of the submissions I had no doubt in ruling that they were solely responsible for the position they were then in, of being without counsel, and that they had reached that position without any reasonable excuse, and that the hearing should proceed. Indeed, it was clear to me that the Respondents' asserted excuses were simply manufactured, to try to avoid, or at least delay, the hearing taking place in the hope that somehow the legal proceedings would go away. The Respondents ignored the attempts of Commission counsel to communicate with the Respondents in advance of the Hearing. (See Exhibit 5; Evidence, vol 1, pp. 5 to 25).

I gave due consideration to this procedural issue at the commencement of the hearing, which consideration I shall review before considering the merits of the Complaint. The Respondent arrived at this hearing unaccompanied by counsel. The question is, was I correct in proceeding with the hearing even though the Respondent was unrepresented by counsel?

2.

The right of a party in proceedings like this to be represented by counsel is one that is, of course, vigorously protected in the law. Indeed, the Statutory Powers Procedure Act R. S. O. 1980, C. 484 provides:

10. A party to proceedings may at a hearing,
 - (a) be represented by counsel or an agent;

The operative word in that provision, of course, is "may". A party, if he or she chooses, may be represented by counsel. There is no requirement that a party be represented, nor does it appear that the proceedings are affected if a party, who desires representation, appears at a hearing without counsel.

Section 7 of the Statutory Powers Procedure Act states:

7. Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any notice in the proceedings.

Thus, where a party has been given proper notice under the Act, a Board of Inquiry is entitled to proceed in the party's absence. Equally then, if a party is given due notice and appears at the hearing without counsel, a Board of Inquiry is entitled to proceed.

The notice requirements in the Statutory Powers Procedure Act are contained in Section 6:

3.

6. -(1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal.

(2) A notice of a hearing shall include,

- (a) a statement of the time, place and purpose of the hearing;
- (b) a reference to the statutory authority under which the hearing will be held; and
- (c) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings.

If the party has been given reasonable notice, including a statement that the tribunal may proceed even in the party's absence, it is implicit that the party has also been advised that if he or she attends the proceedings without counsel then the hearing may proceed notwithstanding the absence of representation. At no time did the Respondent assert that the notice did not so advise him, or that the notice was otherwise unreasonable. In any event, the Notice of Hearing (see Exhibit 4) complies fully with the Statutory Powers Procedure Act. The individual Respondent admitted he had received the notice, both by registered mail and by way of personal service. (see as well affidavits of service, Exhibits 4 and 6).

The language of Section 7 is such that a Board certainly has the discretion to delay the proceedings where a respondent does not attend at a hearing. For example, in a decision of a Board of Inquiry appointed under the B.C. Human Rights Code, R. S. B. C. 1979, C. 186, the Board did delay proceedings where the respondent appeared without counsel: Finlayson, et. al.

on occasion try to kiss her. (Evidence, vol. 1, pp. 32, 36, 47, 48, 53, 56). On about the fifth day of her employment, she testified, Mr. Guercio hired another female employee who he described to Ms. Torres as having "nice breasts, nice bottom", and being a "very nice built girl". (Evidence, vol. 1, pp. 42, 43, 46). On a later occasion Ms. Torres said she saw Mr. Guercio touch this employee's breasts and caress her in front of Ms. Torres. (Evidence, vol. 1, pp. 50, 55). Ms. Torres worked in the office from about 11:00 am. to 6:00 pm. The other employee worked from about 5:00 pm. to 10:00 pm. Ms. Torres testified as well that Mr. Guercio described to Ms. Torres sexual acts with this other employee, that he said he paid this employee for sex (Evidence, vol. 1, pp. 52, 53), and that he bragged about his exploits in this regard.

"Q. Well, did he discuss anything about Dora and going downstairs or anything with you at that time?

A. He would tell me what he would do with her. Once he even told me that he went downstairs with her, in the bathroom, on the toilet and -- that is exactly what he said, it is not something I would phrase, he went on the toilet, he sat down and she sat on him." (Evidence, vol. 1, p. 49)

Ms. Torres testified that on a Friday, apparently May 2, 1980, she was coming upstairs from having used the basement bathroom when Mr. Guercio "grabbed me and put me against the wall", pressing his body against her, and attempted to kiss her. (Evidence, vol. 1, p. 58). She testified that she said to him that if he did not let her go she would no longer work for him and that she then pushed herself free, ran upstairs screaming and left telling "him if he continued I am not going to come back". (Evidence, vol. 1., p. 59).



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v. E. B. Misty, Inc. (Dermot Owen-Flood, Stephen Kelleher, Marguerite Jackson; Oct. 25, 1979). The Board considered the delay ensuing from the respondent's failure to appear with counsel in its award :

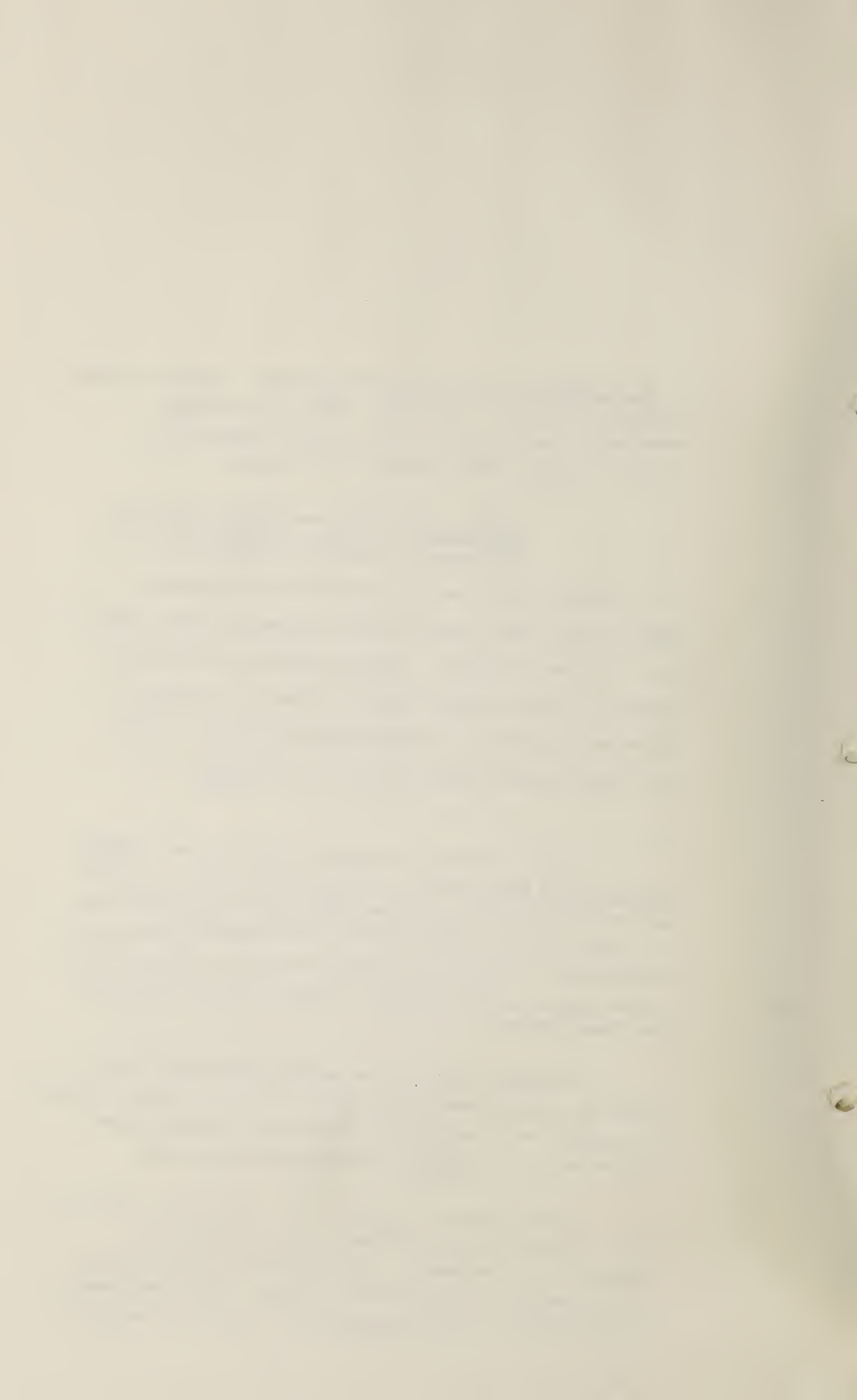
Finally, the delay associated with the Respondent's failure initially to appear with counsel must be considered.

The Board went on to increase the respondent's share of the total costs of the proceedings from one-half to three-quarters. Under subsection 17(3) of the B. C. Code, a Board has the power to "make an order as to costs it considers appropriate". There is no similar provision in the Ontario Code.

I might mention in passing that the new Ontario Human Rights Code (Bill 7, Royal Assent Dec. 11, 1981, not yet proclaimed in force) does have a new provision (s. 40(6)) which allows costs to be awarded against the Commission, but does not appear to have a provision that allows costs to be awarded in favour of the Commission (or Complainant).

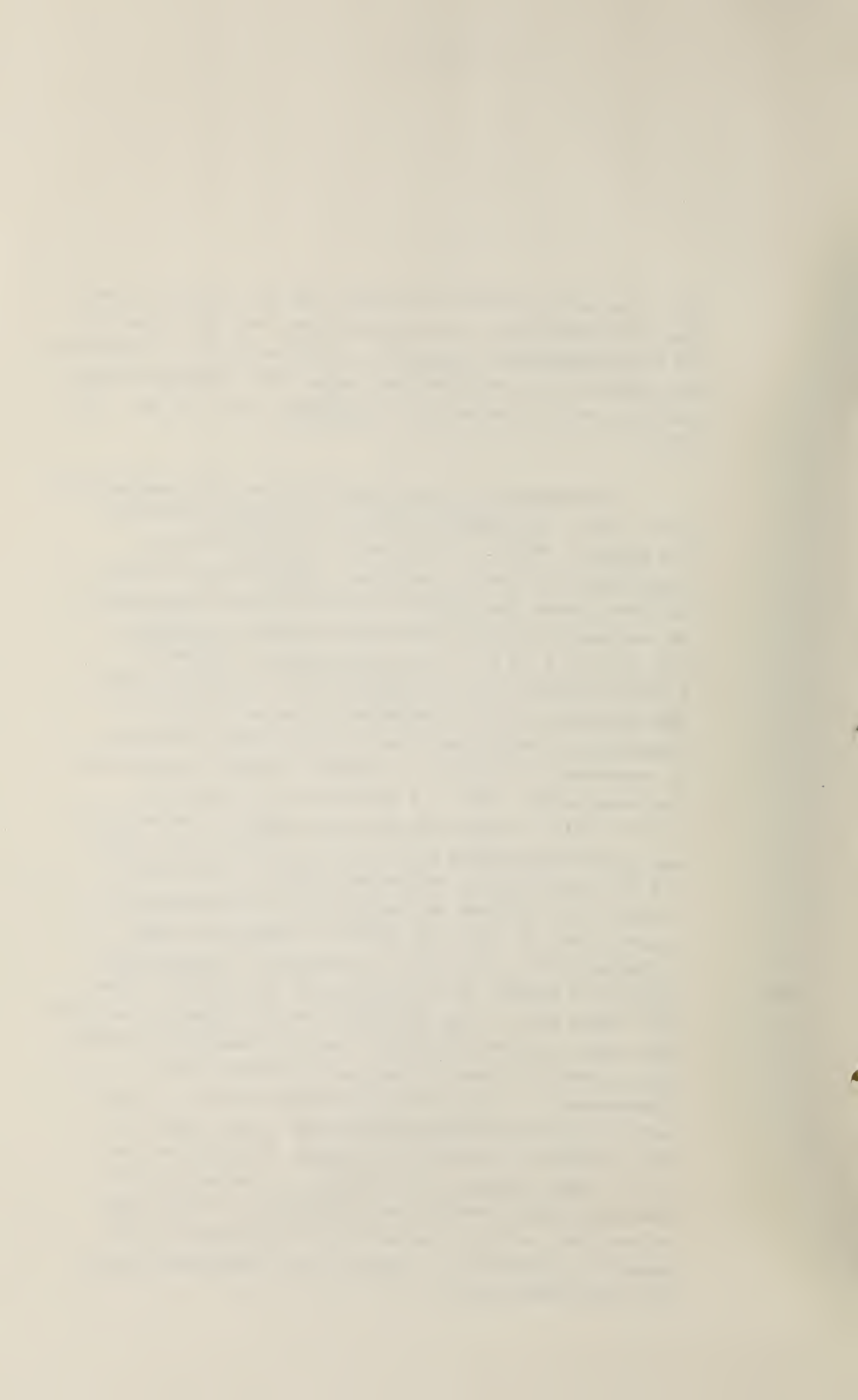
In summary then, it is neither mandatory that a party be represented by counsel, nor that a party himself be present, so long as the party has received proper notice under the Statutory Powers Procedure Act.

In this case, the individual Respondent asserted that he wanted an adjournment to allow him to be represented by counsel. His excuses for not already having counsel at that point in time, the commencement of the hearing, were manufactured. I did not believe



him. He had no reasonable excuse for not having counsel, and considering all the circumstances, and the objection of the Commission's counsel to an adjournment, I exercised my discretion by refusing the request for an adjournment, and the hearing proceeded. (Evidence, vol. 111, pp. 182 - 189).

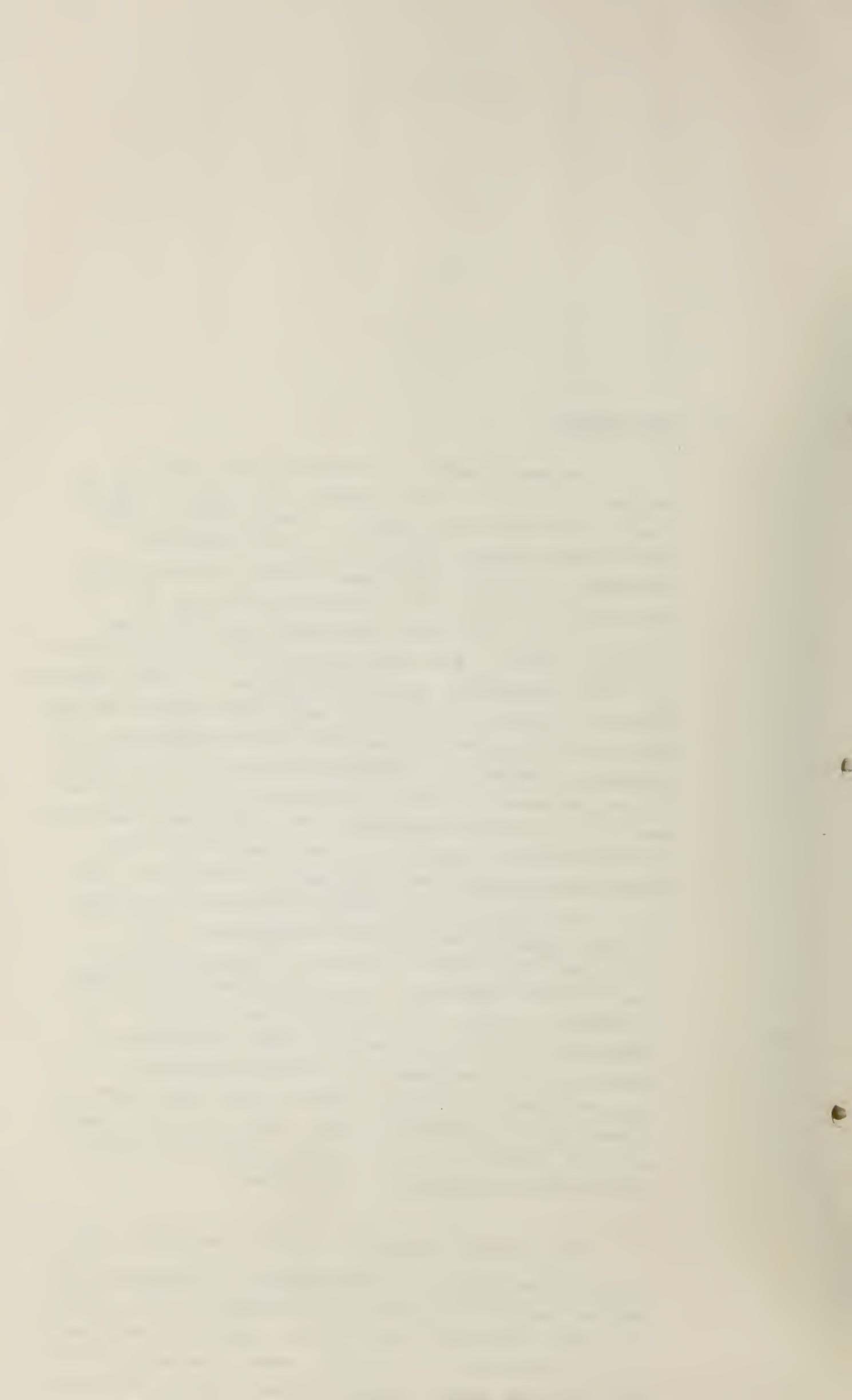
Subsequently, at the completion of the Commission's case, and at the commencement of the second morning of the hearing, before any evidence was given by the Respondent, Mr. Roland Henderson appeared and said he had been asked the previous evening by the Respondents to represent them from that point onwards (Evidence, vol 11, pp. 3 to 8). At Mr. Henderson's request, I then granted a six day adjournment, notwithstanding the objection of the Commission's counsel, for a transcript of evidence to be received and considered by Respondents' counsel, to assist counsel in preparing the Respondents' case. I exercised my discretion at this point in granting the adjournment because there was no real prejudice to any party in doing so, and it was obvious that the Respondents were at that point in time both sincere in wanting to be represented by counsel, and in fact had taken the necessary steps to achieve this. As it is, of course, a fundamental right of a person to be represented by counsel, given that there was no real prejudice to the opposing party at that point in time and given that the Respondents were then sincere in their intent and efforts to be represented, I consented to the adjournment. I would have considered awarding some costs in any event of the outcome of the Hearing, against the Respondents, due to their causing a wasted day in respect of the Hearing through seeking the adjournment, if the Code so provided (and if counsel had so requested). Mr. Henderson proceeded to represent the Respondents most ably and effectively.



2. The Evidence

The Complainant, Ms. Rosanna Torres, age 20, resides in Toronto. Her Complaint (Exhibits #2 and #3) alleges that from about April 7, 1980 to May 5, 1980, she was employed as a secretary by the corporate Respondent, Royalty Kitchenware Limited, which carries on a cookware and cutlery business in Toronto, at 1683 St. Clair Ave. West, using the trade mark name "QUEEN'S CHOICE". She had responded to an advertisement in a local newspaper, printed in Italian. On the premises, there is a front showroom with some three offices at the rear, and a basement with a bathroom and stockroom. The business is apparently conducted through a few showroom sales, but mainly by way of telephone solicitations and door-to-door salesman contact. The individual Respondent, Francesco (Frank) Guercio, is the president of the corporate Respondent and the legal or beneficial owner of all its shares. The corporate Respondent is simply the alter ego of the individual Respondent. The individual Respondent is the sole 'directing mind' of the corporate Respondent, being the President and sole shareholder thereof, and as such, the latter is responsible for the acts of the former committed in carrying on the business. Ms. Torres worked as secretary for Mr. Guercio. Most of the time, there is present at the premises only Mr. Guercio and one female employee, either his secretary, or during the evening, someone doing telephone solicitations.

Ms. Torres' Complaint, and her testimony, were to the effect that from the beginning of her employment she was verbally and physically harassed by Mr. Guercio. Ms. Torres testified that she was repeatedly told that she "was beautiful", that women were "constantly after him", that he would "please" her as a lover, her hands and arms were touched and stroked, and that he would



She returned to work on Monday, only to be told by Mr. Guercio that he was terminating her employment immediately, and that he said, "I don't need you." (Evidence, vol. 1., p. 60). She went to the Ontario Human Rights Commission and filed her complaint that day or the next day.

Ms. Torres had left her previous job as a waitress because she felt it was an opportunity for advancement to work in the position of secretary for Mr. Guercio. Ms. Torres took slightly less pay in moving to the secretarial job (\$3.50/hr. rather than \$3.65/hr.). Ms. Torres emphasized that in the three weeks she worked for Mr. Guercio that he taught her very little about what he wanted her to do as a secretary and that she sat around a good deal of the time, being told how "beautiful" she was. (Evidence, vol. 1., p. 44).

Ms. Torres supports her divorced or separated mother and younger sister on her meagre income. They are entirely dependent upon her, apart from very modest maintenance payments Mrs. Torres receives from her former spouse. Mrs. Torres and her daughters constitute a close, struggling family. It is understandable why she would be reluctant to terminate her employment with Mr. Guercio in the face of his advances, and that she endured the situation until he terminated her employment.

Mrs. Torres was a witness and corroborated her daughter's testimony in every essential detail. Mrs. Torres told her daughter to quit the job when she learned about Mr. Guercio's treatment of Rosanna on May 2, 1980, but her daughter did not quit, because she needed the income. (Evidence, vol. 1, p. 72).

Mr. Guercio terminated Ms. Torres' employment on Monday, May 5. He told her he did not need her services any more, but it is clear from all the evidence that he fired her because she was resisting his advances.

Mr. Guercio attacked Ms. Torres rigorously in cross-examination. He is a strong, energetic, domineering, bullying, self-righteous, emotional man and he was very aggressive in cross-examination. Actually, it was an advantage to have the two protagonists in direct confrontation, for it assisted the Board in assessing the witnesses' credibility.

I have no hesitation in accepting the evidence of Ms. Torres, her mother, Carmela Torres, and the three other witnesses who gave evidence on behalf of the Complainant, and rejecting the evidence of Mr. Guercio. He attacked the Complainant and her witnesses, rigorously and relentlessly in cross-examination, and was given considerable latitude in this regard, but they all met his questions and accusations with firmness and clarity. They were telling the truth, and I so find in respect of their evidence. Where there are discrepancies with the evidence given by Mr. Guercio, I reject his evidence. Mr. Guercio has convinced himself that he has done nothing wrong. There was much shouting and banging of tables by him during the hearing. Mr. Guercio tried unsuccessfully to attack the character of the Complainant and her witnesses. When they stood up to him, he tried to brow-beat them, unsuccessfully, even making thinly veiled threats against some of the witnesses during cross-examination.

Maria Teresa Sciannella, also 20 years of age, now a hairdresser, was employed as a telephone salesperson by Mr. Guercio on three different occasions from 1978 to 1980. She testified under subpoena, and said that while she knew Rosanna Torres, that she had never discussed this Inquiry with her. She testified that the second period of time that she worked for Mr. Guercio coincided with Ms. Torres' period of employment, but that they worked on different shifts.

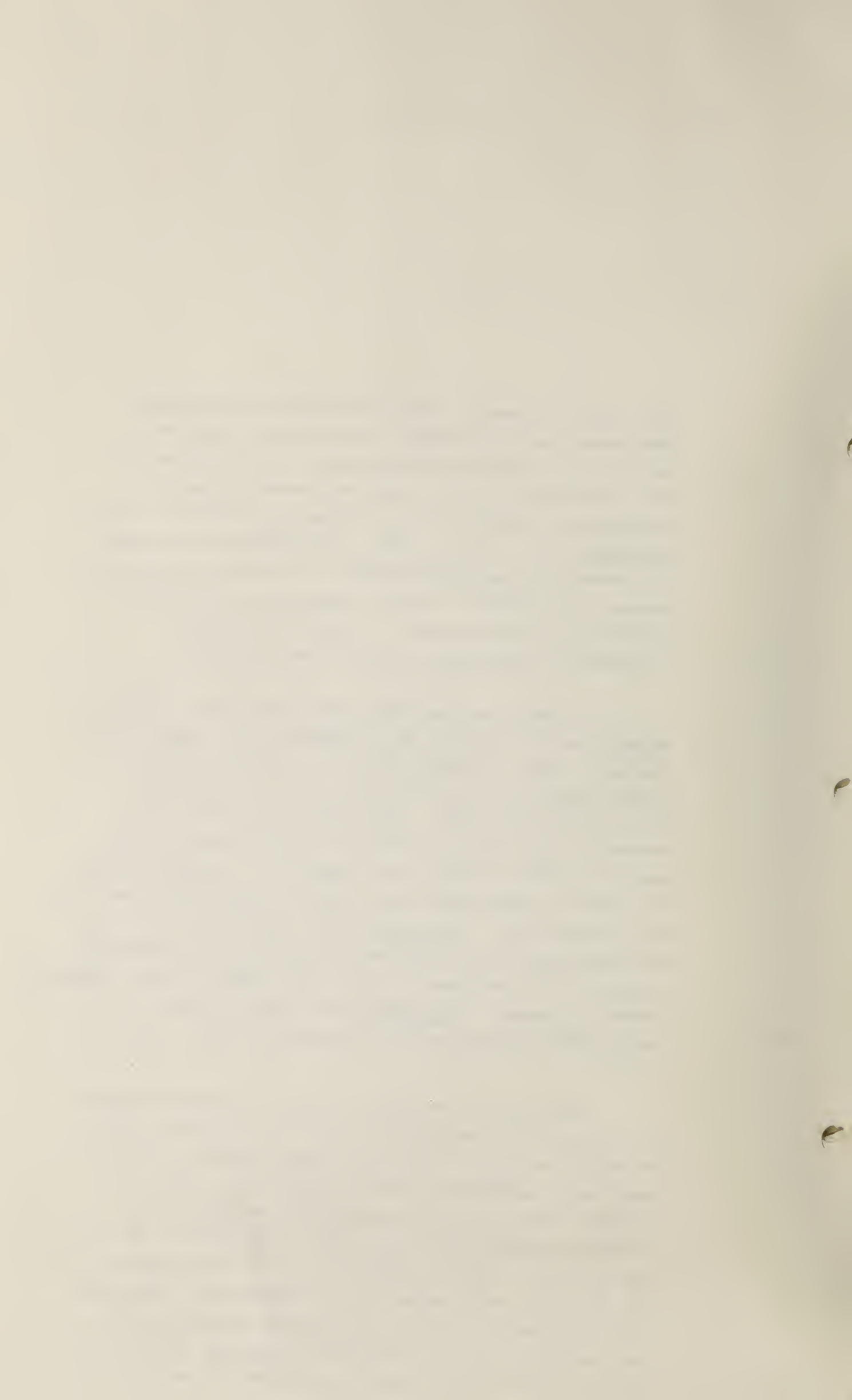
During the second and third times that she worked for Mr. Guercio, Ms. Chanella said that virtually every day Mr. Guercio would "put his arms around" her (Ms. Chanella), stroke her hands and shoulders, try to kiss her, say she was a "nice girl", she was "beautiful", that he "loved" her, and that she needed someone "manly" rather than her boyfriend. She testified that Mr. Guercio had said he would "like to kiss me all over sometime". (Evidence, vol. 111, pp. 127-129, 132). Ms. Chanella is a self-confident person and she was able to rebuff Mr. Guercio and not be afraid of him. Moreover, she testifies she needed the money so continued to be employed by him and even returned to the employment. (Evidence, vol. 111, p. 131). I found Ms. Chanella to be a truthful witness and I accept her evidence.

Miss Michelina Marsico, also 20, now a dental assistant, also testified under subpoena, and stated that she did not know the Complainant. She worked for Mr. Guercio from July to September, 1980, first as a telephone solicitor, later as a secretary. She testified that when they were alone that Mr. Guercio would tell her, in explicit detail, about "his sexual activities" the evening before saying that "(h)e was very colourful (and) described everything." (Evidence, vol. 111, pp.

149, 150). A week before Miss Marsico voluntarily terminated her employment, she said she observed Mr. Guercio caress the breasts of a girl following a job interview, and that this was done in front of Miss Marsico with Mr. Guercio looking straight at her. (Evidence, vol. 111, p. 181). Miss Marsico left the job because of her embarrassment in these situations and because she did not want her reputation endangered by continuing to work there. I found Miss Marsico to be a truthful witness and I accept her evidence.

Ms. Mary Savona, 21, also testified. She had worked for Mr. Guercio as a secretary for two weeks in February, 1980, learning of the position through an advertisement over the Toronto radio station that broadcasts in Italian. She testified that by the second or third day of work Mr. Guercio would often tell her that her body was "beautiful", comment about her looks, caress her hand, put his arms around her, and try to kiss her. (Evidence, vol. 111, pp. 172, 173). She terminated her employment at the end of two weeks, saying it was because she would not submit to Mr. Guercio's sexual advances. (Evidence, vol. 111, p. 175). I accept the evidence of this witness as well.

From all the evidence, a clear pattern emerges. Mr. Guercio, who appears to be in his forties, likes to employ a female, usually a young female, as his secretary, and submits her to continuing sexual advances. None of the employees who testified ever learned all that much as to what they were to do in the job. Mr. Guercio appears to work very hard in his business, and seems to be successful. There was no significant suggestion that there was ever any real danger, of his using direct physical force to get his way with his female employees. However, he is a very domineering, aggressive individual and it is very obvious from all the evidence that he wanted



a secretary who was in a dependant relationship to him, so that he could take sexual advantage of the girl. If she resisted, he eventually fired her, and hired another, looking for another opportunity. In some ways, he was kind to his employees; as an example, he took Rosanna Torres and her mother together with other employees, out for dinner within a few days of her being hired. However, he was sexually attracted to his youthful secretaries and he continually pressed his advances upon them, harassing them and making their lives miserable at work. He fancies himself as having machismo and regards his secretary (and women generally) as simply an object and outlet for his sexual passion, as an extension for his own desires, not as a person who has feelings and rights as an independent human being. His view is that if the secretary does not like his sexual advances she can leave on her own, and if she resists too long he will terminate her employment in any event, hiring a new secretary and hoping he can take sexual advantage of her. He has convinced himself that he was the aggrieved party in this proceeding. His rationalization is that if a secretary does not care for his sexual advances, she can leave the job. In other words, his view is that the advances are part of the job requirement and that a secretary voluntarily accepts the work environment complete with sexual advances, when she voluntarily chooses to stay with the job.

Mr. Guercio's main defence was that if he was in fact guilty of sexually harassing a female employee (which he denied) that she should simply quit her job if she did not like it.

The only evidence that seemed, at first impression to appear to help Mr. Guercio, was that of Jessica Rena Adams, age 25, who has worked for him, doing displays, cleaning, writing cheques, and other odd jobs, off and on, two or three times a week, since Dec. 15, 1980. She testified:

"Q. What has his conduct been over the course of time that you have worked with him?

A. I have never really had any problems with Mr. Guercio. He's -- everything is on a business level. Once in a while we have gone for lunch, and supper, and the odd time we have have gone for a drink. He's never made any sexual advances against me -- or towards me. All I can say is, like, I've had no problems with him."
(Evidence, vol, 111, pp. 140, 141)

I find Ms. Adams to be a truthful witness and accept her evidence as to her relationship with Mr. Guercio, which was all she could testify about. The question arises then - given the fact that Ms. Adams is an attractive, single, female employee, is there any explanation for his gentlemanly conduct towards her, in contrast to his sexual advances and harassment of the Complainant and the other female employees who testified? It was argued by counsel for the Commission that by Dec. 15, 1980, Mr. Guercio must have known of Ms. Torres' Complaint, so that he

then was being proper in his relationships with his female employees. This is a possible explanation, however, I think the real explanation lies in the fact that Ms. Adams is somewhat older, and seems much more sophisticated, with considerable poise, and self-confidence and independence, than the Complainant and other female employees who testified. Ms. Adams was not really in a dependent relationship to Mr. Guercio, and I think, while it may seem like a paradox, that Mr. Guercio would be reticent to make sexual advances toward Ms. Adams, given her personality. I find this to be the explanation for Mr. Guercio's different relationship with Ms. Adams, when compared to his relationships with the Complainant and other female witnesses. Ms. Adams was the only female employee to testify on behalf of Mr. Guercio.

It took Ms. Torres some four months, until September, to find another employment position, and she has held a number of jobs since that point in time, but now seems steadily employed as a secretary with a construction firm. She would have earned about \$500.00 a month in her (so-called) secretarial position with the Respondents.

The evidence is clear that Rosanna Torres suffered considerable emotional distress, anguish and depression by virtue of Mr. Guercio's sexual harassment. (Evidence, vol. 1, pp. 44, 64-66).

One has to be careful in assessing a complaint of sexual harassment. First, the accusation will sometimes be simply the means of retaliation by a disgruntled, fired employee. Second, human nature results in it not being uncommon for there to be a social relationship between a male employer and female employee, or between a female employer and male employee, from the same workplace. Third, there are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the workplace their relationships with the opposite sex, or in telling sex 'jokes'. It is not the intent, or effect, of the Human Rights Code, or the function of a Board of Inquiry, to pass judgment upon such persons. It is only 'sexual harassment' that is unlawful conduct.

I have no doubt in finding, given all the evidence in this Inquiry, that the individual Respondent sexually harassed the Complainant, and that he was in breach of paragraphs 4(1)(b) and (g) of the Ontario Human Rights Code, R. S. O. 1980, c. 340 (hereinafter referred to simply as the "Code"). I shall now proceed to review the applicable law.

3. Sexual Harassment - The Law

The prohibition against sexual harassment in the Ontario Human Rights Code, Revised Statutes of Ontario, 1980, chapter 340 can be traced to the decision of the Board of Inquiry in Cherie Bell v. Ernest Ladas and Flaming Steer Steak House Tavern, Inc. (1980) 1 C.H.R.R. D/155, (Mr. O. B. Shime, Q. C.). The Board stated there that sexual harassment in the workplace could constitute a breach of paragraph 4(1)(g) of the Code and that prohibited conduct included everything from verbal solicitations to unwelcomed physical contact.

The governing provision of the Code states:

- s. 4(1) No person shall ...
 - (g) discriminate against any employee with regard to any term or condition of employment, because of ... sex ... of such employee.

Thus, in the Cherie Bell case, the Board found that sexual harassment came within the general prohibition against sexual discrimination in relation to terms or conditions of employment. However, in the result, the Board went on to find that on the facts of the case, the complaint had not been established.

Based on the broad interpretation given by the Board in Bell to the words "term or condition of employment" in paragraph 4(1)(g) of the Code, several complainants have subsequently brought successful complaints of sexual harassment against their employers. There appear to be no cases from provinces other than Ontario.

In Meri Controubis and Irene Kekatos v. Sklavos (Prof. E. J. Ratushny, June 16, 1981), 2 C.H.R.R. D/457, the Board held, without referring to the Bell decision, that sexual harassment was prohibited under paragraph 4(1)(g) of the Code. Equally, speculated the Board, where complainants are forced to quit their job because of sexual harassment, a complaint may be brought under paragraph 4(1)(b). That is, where complainants choose to leave their employment rather than endure unwelcomed sexual advances, the complainants may be deemed to have been dismissed. In such a case, the prohibition against discriminatory dismissal in paragraph 4(1)(b) may be invoked.

The complainant, Meri Coutroubis in that case had been embraced and kissed by her employer while she was working alone in the employer's dark room. She screamed, her employer released her, and she immediately left for home. The complainant Irene Kekatos was subjected to a similar assault a few days after the Coutroubis incident. The two complainants, after sharing their respective experiences, decided to leave their employment immediately.

The Board found that there had been "flagrant violations of Section 4(1)(g) of the Code by the Respondent in relation to both complainants" (p.D/458). Professor Ratushny then went on to award the complainants special damages for lost wages and general damages for the psychological injury that they suffered.

The next case involving a complaint of sexual harassment was Allison Hughes and Lorry White v. Deiter Jeckel (Robert W. Kerr, August 20, 1981). There, both complainants testified that they had been victims of the respondent's sexual advances.

The failure to comply with their employer's sexual demands, the Board found, resulted in the dismissal of both complainants from their employment.

The Board adopted the reasoning of the Board of Inquiry in the Bell case and then went on to say:

In my view, harassment based on a factor in respect of which discrimination is unlawful is inherently in violation of the Ontario Human Rights Code since it singles out the victim for treatment on the basis of that factor. (p. 5)

In other words, harassment itself, based upon prohibited grounds under the Code, is proscribed just as are other forms of discrimination upon such grounds. The Board in Hughes referred to its previous decision in Singh v. Douglas (Robert W. Kerr, 1980) 2 C.H.R.R. D/285 where it had been adopted that reasoning in the context of racially motivated harassment. I have recently taken the same approach in the case of Dhillon v. F. W. Woolworth Limited (Feb. 12, 1982) in considering whether verbal abuse based upon race could give rise to a complaint under the Code.

In Hughes, the Board found both complaints to have been established. The respondent chose neither to appear nor to present evidence. As such, the facts were not in issue. Sexual harassment in the form of trespass to the person was found to have taken place. The Board awarded the complainants compensation for lost wages and general damages for the embarrassment and humiliation that they suffered.

The next case was Teresa Fay Cox and Debbie Cowell v. Jagbritte, Inc., and Gadhoke (Sept. 28, 1981). In that case, I traced the development of the jurisprudence in the United States on sexual harassment and found that the approach

there is similar to that set forth in the Bell decision. That is, tangible employment consequences of refusal to comply with sexual advances need not be shown in order for a complaint to be successful. A complainant need only show that the work environment was "poisoned" by the harassment.

In the Cox case, the two complainants chose to leave their employment because of the sexual harassment they suffered. Their employer persistently urged his sexual desires on the complainants and other female employees, when such verbal and physical advances were obviously unwelcomed. It was quite apparent that the respondent employer was acting under the mistaken, sexist impression that females, despite their resistance to sexual advances, actually enjoyed such behaviour. That the respondent treated his female employees in a sexually discriminatory fashion, as prohibited by the Code, was certain.

Under the circumstances, I awarded the complainants damages for lost wages and substantial general damages for the intimidating hostile and offensive work environment suffered by the complainants.

Another case, heard by the same Board as in Hughes, was decided soon after Cox: Lynda Mitchell v. Traveller Inn (Sudbury) Ltd. (Robert W. Kerr, October 7, 1981) 2 C.H.R.R.D/590. In that case, the complainant had received an offer of employment from the respondent. When she reported for work, she spoke to the manager of the motel. He, at that time, made certain remarks that she took to be sexually suggestive and that indicated that sexual compliance was to be a condition of

her prospective employment. The Board stated in considering whether there had been a breach of the Code:

There was nothing explicitly sexual about Mr. Czaikowski's remarks, making it at least conceivable that this was simply a case of misunderstanding. On the other hand, harassment does not have to be explicit to be contrary to the Human Rights Code. Harassment can be affected by implication. Stereotyping, the very thing which human rights laws are designed to combat, is actually a facilitator of insult by mere implication. It would be strange if the law allowed harassment to escape its application because, through stereotyping the harassment was implicit, rather than explicit. (p. D/592)

The complainant, obviously, did not accept the offer of employment. She did not present evidence of any loss of employment income. As such, the Board awarded only general damages for the insult to the complainant's dignity.

The Ontario cases just discussed demonstrate that the prohibition in the Code against sex discrimination in the form of sexual harassment is a far-reaching one. The Code proscribes conduct as blatant and offensive as might constitute a trespass to the person (Hughes; Cox; Coutroubis) and as subtle as implicitly suggestive remarks (Bell; Mitchell). A complaint may be brought under paragraph 4(1)(b) if an employer dismisses or refuses to hire a complainant for her failure to comply with sexual advances (Hughes; Mitchell) or under paragraph 4(1)(g) if an employer, by sexually harassing employees, imposes discriminatory terms or conditions of employment (Bell; Coutroubis; Hughes; Cox).

There is no doubt that Boards of Inquiry, by their creative interpretations of the Human Rights Code, have made a substantial penetration into the workplace in order to

eradicate an insidious form of discrimination. As the Board of Inquiry (O. B. Shime, Q. C.) said in Bell:

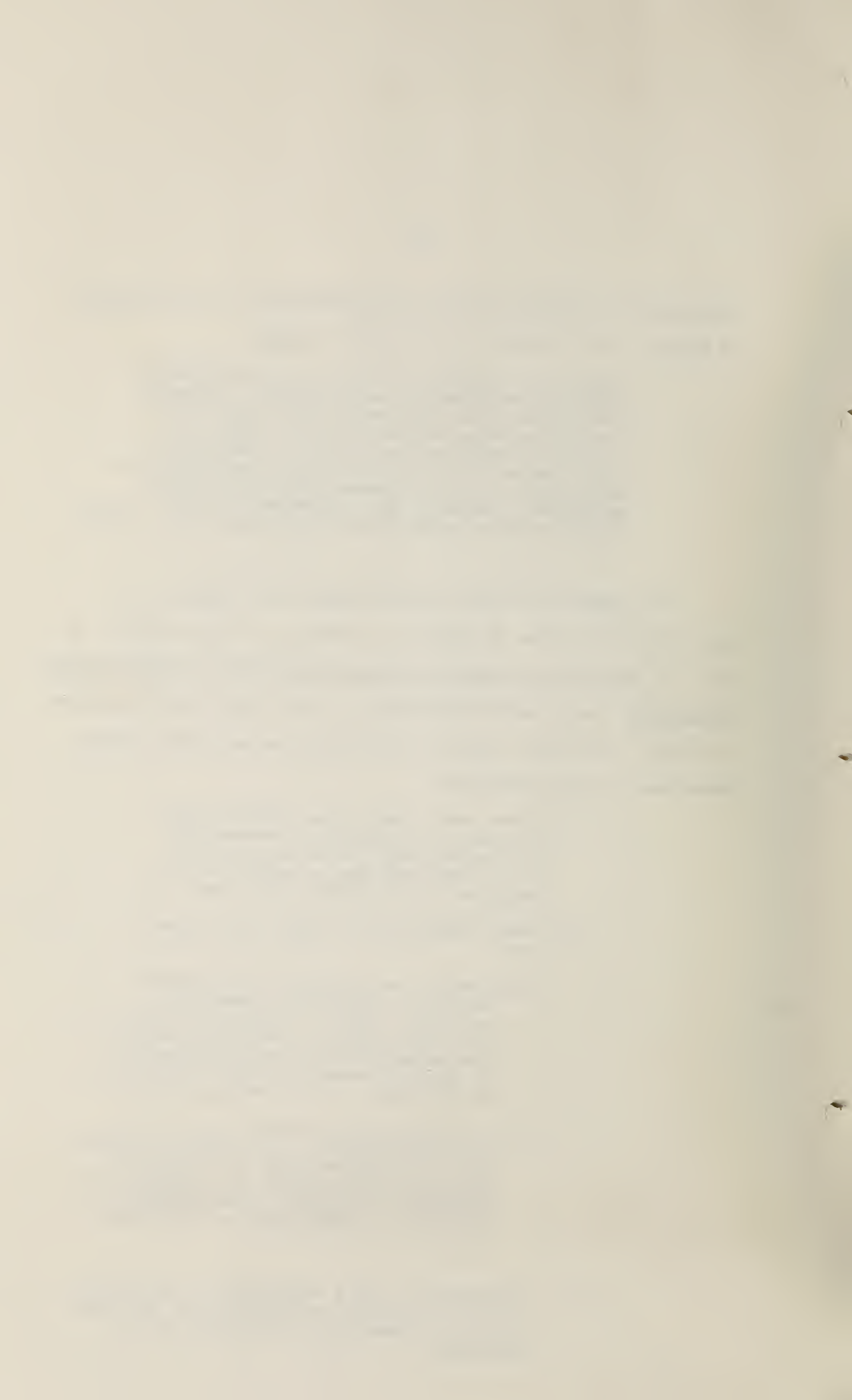
There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment. (p. D/156)

It appears that the Ontario Legislature approves of the initiative shown by Boards of Inquiry in this matter. In Bill 7, An Act to revise and extend Protection of Human Rights in Ontario (Royal Assent December 11, 1981, not yet proclaimed in force), there are specific provisions proscribing sexual harassment in the workplace:

- 6.--(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- (3) Every person has a right to be free from,
 - (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

...

- 9.--(f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.



Thus, when the new Code is proclaimed in force, residents of Ontario will have a much clearer statement of their right to be free from harassment of any sort in the workplace.

At present, there are no other Canadian jurisdictions that specifically prohibit sexual harassment. British Columbia, however, appears to be moving toward the adoption of a provision like the one that is soon to be in force in Ontario. The following is taken from a Discussion Paper (1981) of the Legislative Review Committee of the British Columbia Human Rights Commission: Recommendations for Changes to Substantiate Sections of the Human Rights Code.

...

c. Sexual Harassment

Sexual Harassment is becoming an increasing problem. The term "sexual harassment" refers to harassment, intimidation, coercion, or threats to suspend, impose a penalty on, or discriminate against any person because of that person's refusal to engage in sexually related interaction while applying for work, during work, or after work.

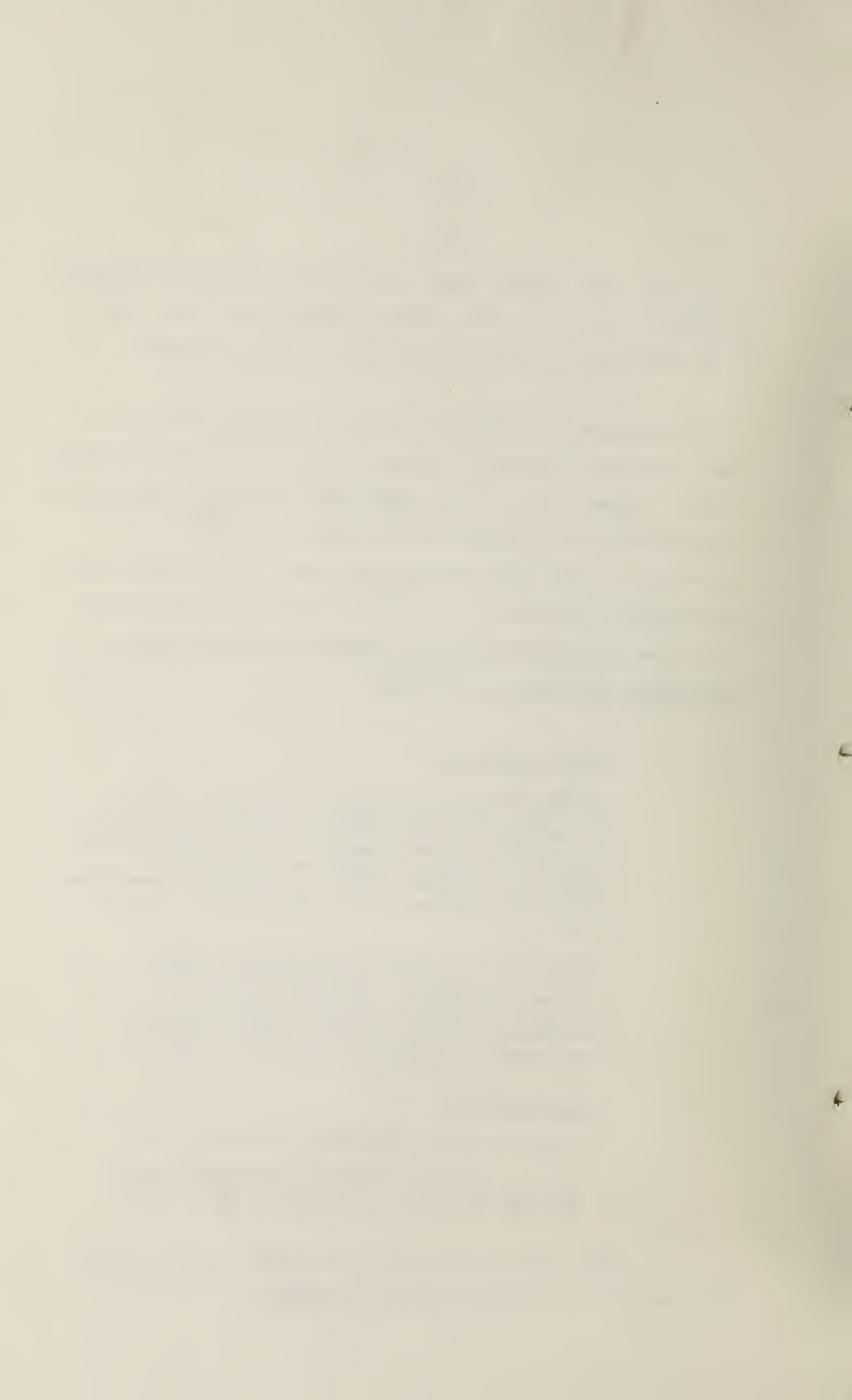
Complaints of this type are being accepted under Section 8 of the Human Rights Code (refusal to employ, continue to employ, advance or promote a person without reasonable cause). None of these complaints have been taken to a board of inquiry or been ruled on by the courts.

Recommendation

The Human Rights Commission recommends:

That protection against sexual harassment be made explicit in the Human Rights Code.
(p. 12)

I shall now review the law in respect of the remedy of "damages", as provided for by the Code.



4. Damages

(i) The Canadian Statutes

When first enacted, Human Rights statutes in Canada gave very limited powers to Boards of Inquiry. Usually, boards were empowered merely to hear complaints and, where a complaint was justified, to make recommendations to the Minister responsible as to appropriate remedial actions to be carried out. Subsection 25(3) in the Prince Edward Island Human Rights Act S.P.E.I. 1975, c. 72 is typical in this respect:

Where the matter referred to the board of inquiry is not settled between the parties and the board finds a complaint is supported by a reasonable preponderance of the evidence, the board shall report its recommendation to the Commission on the course that ought to be taken with respect to the complaint.

Only Prince Edward Island, New Brunswick, Newfoundland, and Québec boards retain a purely recommendatory function. The Newfoundland Human Rights Code R. S. N. 1970, c. 262, is similar to the P.E.I. Act in that the Commission, on the completion of its inquiry must make recommendations "with respect to the matters referred to it," (subsection 18(1)).

The New Brunswick Human Rights Act R.S.N.B. 1973, c. H-11, and the Québec Charter of Human Rights and Freedoms R.S.Q. 1977, c. C-12 do contain, though, some guidelines for the type of recommendations that boards may make. Section 22 of the New Brunswick Act provides that:

...(T)he recommendations of the Board and the order of the Commission may include reinstatement of the aggrieved person in his employment, with or without compensation for loss of employment.

Section 82 of the Québec Charter permits the Commission to

...recommend the cessation of the act complained of, the performance of an act, or the payment of an indemnity, within the delay it fixes.

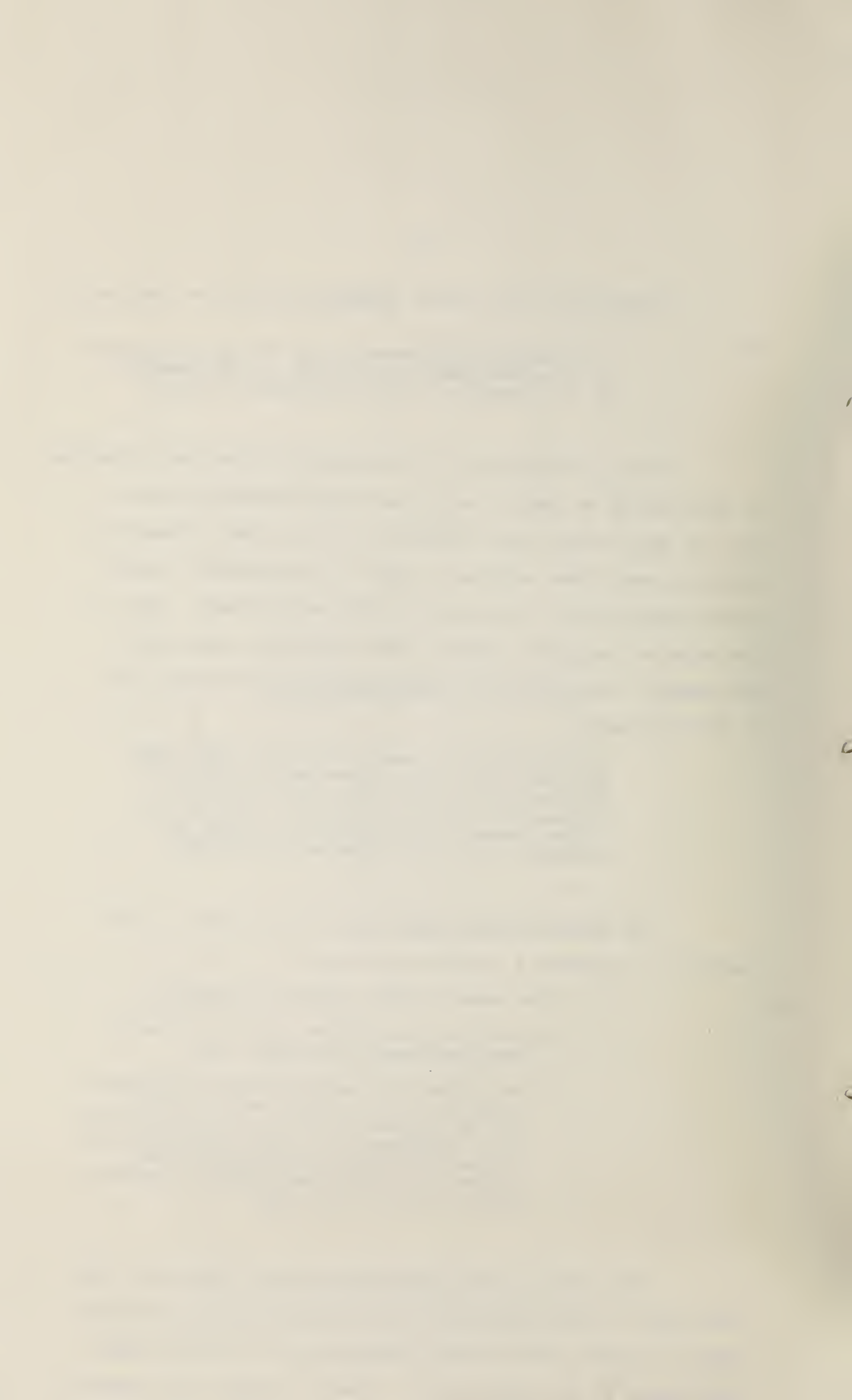
Most jurisdictions in Canada have revised their statutes to make boards of inquiry more than simply advisory bodies. That is, most boards have the power to make orders themselves. However, among these statutes, there is considerable variety in the definition of the boards' order-making power. Some of the statutes leave the boards' power completely open-ended. For example, the Nova Scotia Human Rights Act C.S.N.S. 1979, c. H-24 provides:

Section 26A(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

The Ontario Human Rights Code R.S.O. 1980, c. 340, section 19, contains a similar provision.

19. The board, after hearing a complaint,
- (a) shall decide whether or not any party has contravened this Act; and
 - (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor. 1971, c. 50, s. 63, part.

The power of Nova Scotia and Ontario boards is, thus, very broad, since there are no specific guidelines as to the types of orders that are most appropriate or that have been anticipated by the Legislature. Clearly, though, the remedies



provisions in these two statutes are most consistent with purely compensatory orders. Boards may order the doing of "any act or thing", implying very broad powers, yet that "act or thing" must constitute "full compliance" with the statute. Other powers to "rectify any injury" or "make compensation therefor" are, I think, broad enough to incorporate awards of general damages, but it is certainly not clear that awards of punitive damages are authorized by the statutes. The only latitude for interpretation in the sections is in the words " ... any act or thing that constitutes full compliance ...". Whether those words are broad enough to permit a board to award punitive damages will be explored below, after examining the cases that interpret the section.

Other statutes particularize the orders that boards may make. For example, the Alberta Individual's Rights Protection Act R.S.A. 1980, c. I-2 provides:

Section 31 (1) A board of inquiry

- (b) may, if it finds that a complaint is justified in whole or in part, order the person against whom the finding was made to do any or all of the following:
 - (i) to cease the contravention complained of;
 - (ii) to refrain in future from committing the same or any similar contravention;
 - (iii) to make available to the person discriminated against the rights, opportunities or privileges he was denied contrary to this Act;
 - (iv) to compensate the person discriminated against for all or any part of any wages or income lost or expenses incurred by reason of the discriminatory action;
 - (v) to take any other action the board considers proper to place the person discriminated against in the position he would have been in but for the contravention of this Act.

Thus, the specific power to award damages in Alberta is limited to the payment of special damages for loss of income and expenses. However, the broad power in subparagraph 21(1)(b)(v) to restore the complainant to his or her original position may well include the power to award general damages for any psychological injury.

The remaining statutes are similar to that of Alberta in that they do contain guidelines to boards of inquiry as to the types of orders that may be made. Unlike the Alberta statute and the other preceeding statutes, though, the following contain specific provisions with respect to the awarding of general or exemplary damages.

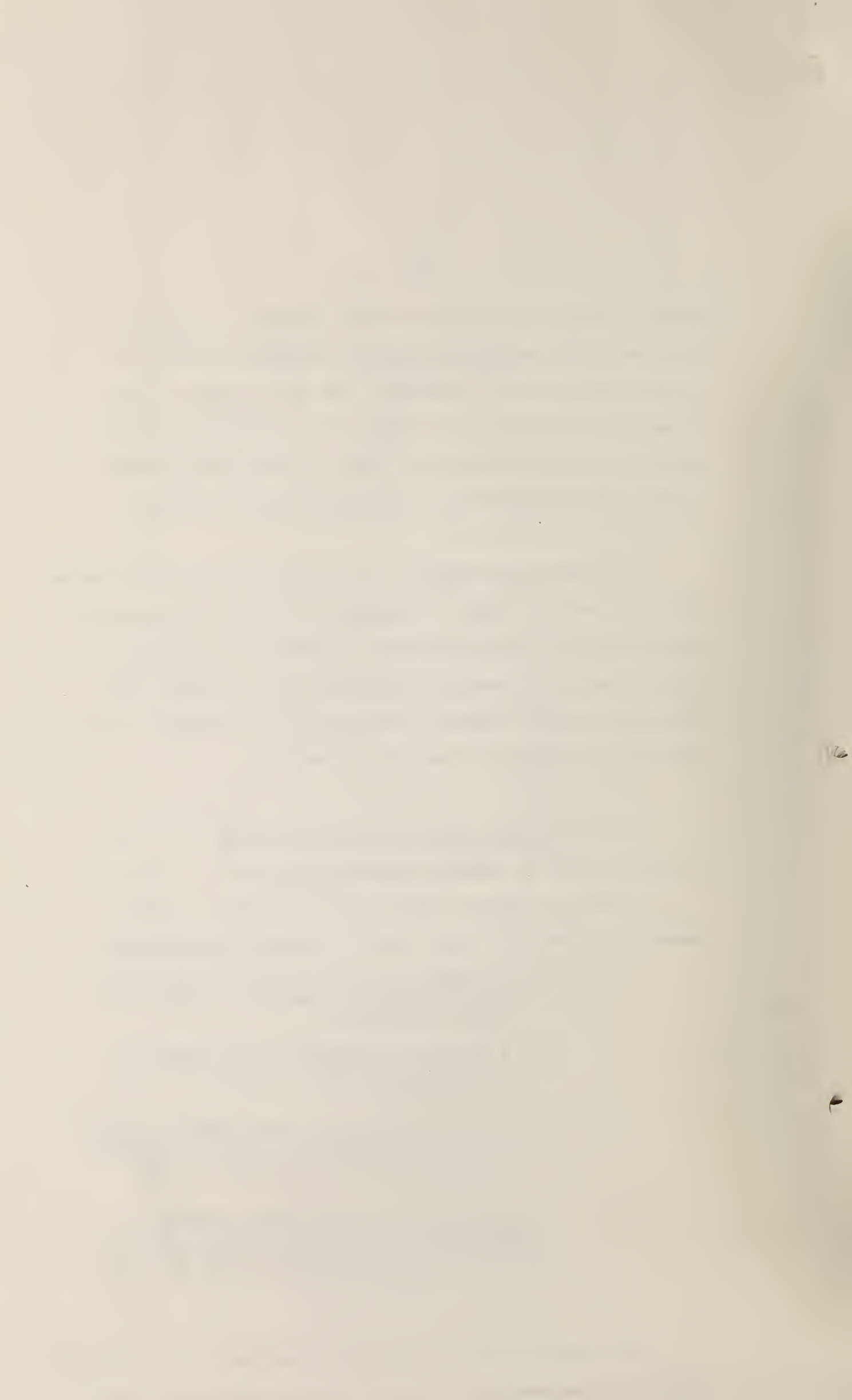
Both the Saskatchewan Human Rights Code S.S. 1979, c. S-24.1 and the Canadian Human Rights Act S.C. 1976-77, c. 33, contain clauses that refer to awards of general damages. Subsection 41(3) of the Canadian Act provides:

41.-(3) In addition to any (other) order that the Tribunal may make..., if the Tribunal finds that

- (a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or
- (b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

The Saskatchewan provision (Subsection 31(8)) similarly refers to "compensation" of the victim either for injury to feelings or for having been the victim of wilful discrimination. Thus, these two Acts provide specifically for general



damages, but do not appear to contemplate the awarding of punitive damages. In Saskatchewan, such an award would only be possible if the words in the general remedies section, "... any act or thing that ... constitutes full compliance ..." (subsection 31(7)), the same words as are contained in the broad Ontario and Nova Scotia provisions, could be so construed.¹

The British Columbia Human Rights Code R.S.B.C. 1979, c. 186, contains a damages section similar to those in the Canadian and Saskatchewan statutes. The difference in the British Columbia Code is that general damages may not be awarded unless the wrongdoer acted "knowingly or with a wanton disregard" and the victim "suffered aggravated damages in respect of his feelings or self-respect". Both conditions must be present before a board may award general damages up to \$5,000.00 (paragraph 17(2)(c)).

A curious feature of the British Columbia Code is that although the general damages provision refers to "compensation" of the victim, there seems to be a clear characterization of the awarding of general damages as punitive. Not only are general damages characterized as punitive, but so are special damages for loss of income. Under the offence section of the British Columbia Code (Section 24), if a person is convicted of a contravention of the Code and a board of inquiry has previously made an award of special or general damages for that contravention, then the wrongdoer

¹The Manitoba statute is structured the same as the Saskatchewan Act, but there is no question but that Manitoba boards have the power to award punitive damages; see below.

will not be liable to a fine. In other words, the awarding of damages of any sort is viewed as a penalty against the wrongdoer, such that if the same person is subsequently prosecuted for his or her discriminatory behaviour, no penalty will be imposed.¹

The only remaining statute to consider is the Manitoba Human Rights Act S.M. 1974, c. 65, (as amended by S.M. 1976, c. 48, s. 18). The Manitoba Act is the only Canadian statute that expressly gives boards of inquiry the power to award punitive damages. Paragraph 28 (2)(c) of the Act empowers a board, in its discretion, to

28.-(2)(c) Order the person who contravened the Act to pay to the person discriminated against, a penalty or exemplary damages in such amount as the board may determine, if the board is of the opinion that the person discriminated against suffered damages in respect of his feelings, or self-respect.

A board in Manitoba then, may impose a penalty upon the wrongdoer where there has been an injury to feelings. Presumably, the phrase "or exemplary damages" in the Manitoba provision allows general damages in compensation of injury to feelings.

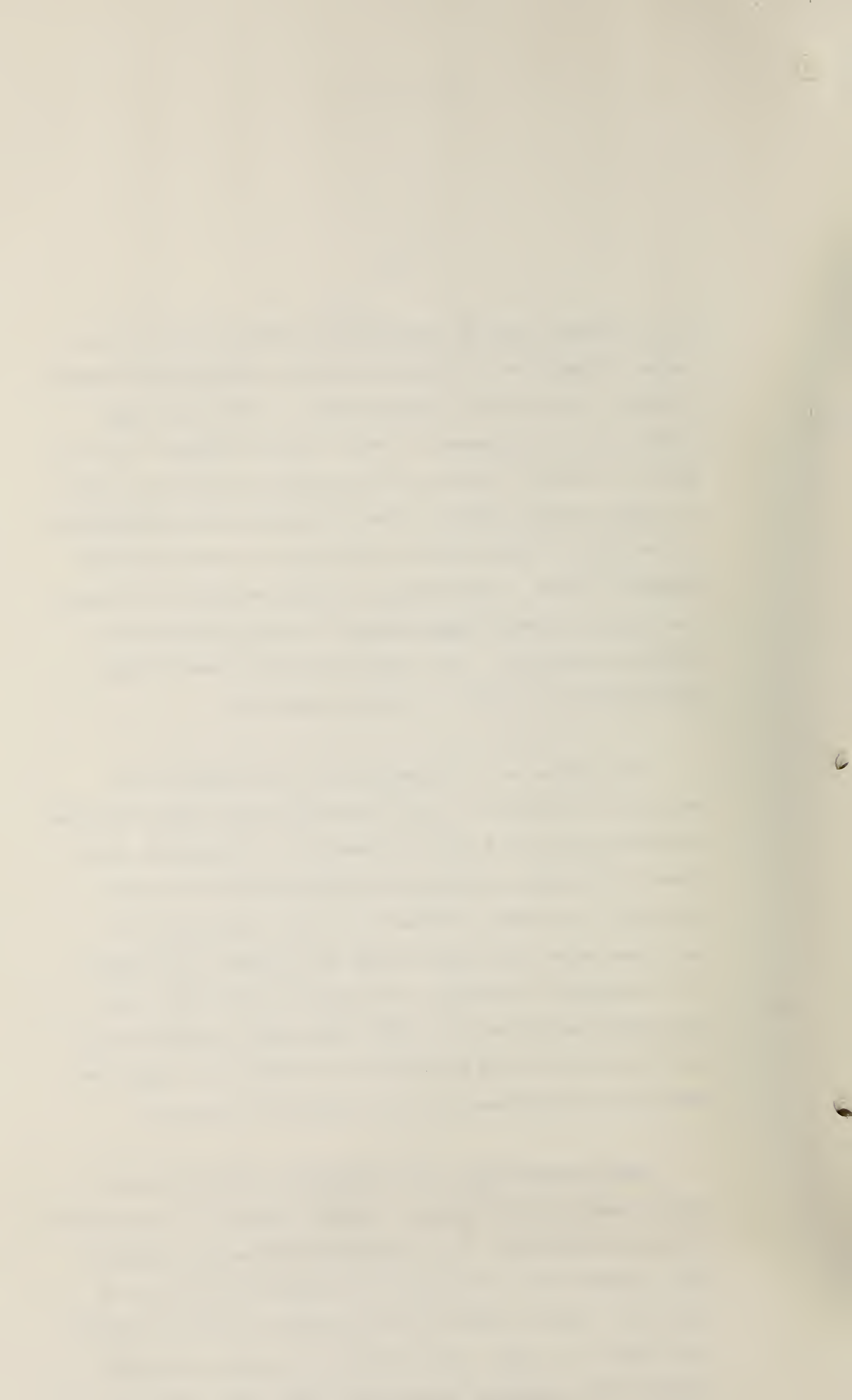
In summary, then, there is great variety in Canadian Human Rights statutes as to the powers of boards of inquiry. Some boards may merely make recommendations after hearing an inquiry (Prince Edward Island, Québec, Newfoundland, New Brunswick). Other boards have open-ended powers, but

¹ Several B. C. cases have indeed concluded that awards of special or general damages may include a penal element based on Section 24: Finlayson v. E. B. Misty, Inc. (Oct. 25, 1979); Dram v. Pho (Aug. 8, 1975); Sam v. Tymchischin (Jan. 1976); Strenia v. Bob Bennetts and Comox Taxi Ltd. (Aug. 5, 1981), 2 C.H.R.R.

it is arguable whether the wording of their governing statutes contemplates anything but purely compensatory damages (Ontario, Nova Scotia, Saskatchewan). The Alberta Act refers only to the power to award special damages, but the power to restore victims of discrimination implies a power to award general damages. Some statutes refer specifically to the power, under certain conditions, to award general damages (Canada, Saskatchewan, British Columbia), although the British Columbia Code appears to characterize such awards as punitive. Only the Manitoba Act specifically gives boards the power to impose penalties.

The purpose of this comparison of statutes was to determine the extent to which Canadian boards have the power to award general and punitive damages. As has been seen, there is certainly no consistent approach across jurisdictions. In order to determine what the powers of a board are under the Ontario Code that governs this Board, it is necessary to examine the cases on the matter, for the determination must be based both upon a consideration of the principles and policies that underlie the Code, and the actual interpretation of the empowering section.

Before proceeding to an examination of cases that discuss appropriate remedies, another feature of the statutes should be mentioned. It is common to all of the statutes that a person who contravenes a provision of an Act or an order of a Board is guilty of a summary conviction offence and liable to a fine. Thus, there is a purely punitive aspect to all Canadian human rights statutes. This may account for the absent, or at least ambiguous, jurisdiction



of boards to make punitive awards. It is still a question, though, whether this Board is empowered, within the words of the Ontario Code, to make a punitive award notwithstanding the separate offence section (section 21).

(ii) The Canadian Cases

Historically, Boards of Inquiry have interpreted Human Rights statutes and the remedial powers under those statutes in accordance with their perception of the purposes of the legislation. There has been a trend in Canadian cases beyond the early, limited view that human rights laws have as their primary purpose that of effecting public education about human rights in Canadian society, to the broader view that the essence of the statutes is compensation to the aggrieved individual. That trend will be traced below.

One of the clearest statements on the thrust of the Ontario Human Rights Code is contained in the decision of Professor Walter Tarnopolsky in Phyllis Amber v. Mr. and Mrs. Max Leder (April 10, 1970). The Board stated:

Human Rights legislation in Canada was intended to subordinate certain rights of contract and property, which existed at common law, to new rights deemed necessary for forwarding the equality, dignity and rights of all human beings. This is done (in the case of the Ontario Human Rights Code this is made explicit in the preamble) in the interests of public policy. The promotion of this public policy is, by section 8 of the Code, a task of the Ontario Human Rights Commission. It follows clearly, therefore, that complaints of discrimination are not matters merely between two parties - the complainant and the respondent - but a matter concerning the public. An act of discrimination does not give rise merely to a new private claim for compensation - it amounts to a public wrong. (p. 9).

Professor Tarnopolsky went on to discuss the matter the matter of compensation in more detail:

Although at common law some attempt may be made to compensate for emotional injury, I do not believe that this was contemplated by the legislature under the Ontario Human Rights Code. As I indicated in Part I of this report, the emphasis is on re-education, and on obtaining equality of access to jobs, accommodation, etc. Even (counsel for the complainant) ... suggested that payment of monies could be an attempt to buy off complainants, and could be a further injury to dignity, rather than compensation for such injury. I would have to agree, and would not make any recommendation for such payment.

As far as actual monetary loss is concerned, the difficulty faced by a Board of Inquiry is to determine which items are traceable to the act or acts of discrimination, and whether there should be some limitation of these costs because of factors such as reasonableness, remoteness, intervening, or contributory cause. (p. 17)

At the time of the decision in Amber, then, there was an obvious reluctance to award special damages and an express aversion to general damages for injury to feelings. The educative purpose of the Code was emphasized. It must be remembered that at the time, the Code gave little power or guidance to Boards of Inquiry. Under subsection 14(3) of the Code, Boards merely made recommendations as to "the course that ought to be taken with respect to the complaint". The present wording in Section 19 of the Code did not appear until 1971, (S.O. 1971, c. 50, c. 63).

The same approach was taken in the first case to go before a Board of Inquiry in Nova Scotia: Ronald Pate v. George Wonnacott (T. H. Cooper, October 16, 1970). The Commissioner found that the complainant had been denied accommodation because of his race and colour, yet declined to award any monetary compensation:

I agree with Dean Tarnopolsky that compensation for injury such as this was not contemplated by the Ontario Legislature when it passed the Ontario Code, or by our legislature when it passed the Human Rights Act. The main purposes of the Act are education and the promotion of equality of opportunity for jobs, housing, and so on, and not to give a complainant the additional opportunity of compensation in money terms - except possibly where the damages are special, that is, where specific sums can be shown to have been lost by reasons of the discriminatory act. (p. 21)

Other jurisdictions, however, even without any statutory guidance, were less reluctant to award compensation where a complaint had been established. For example, in an Alberta case, Beaty Hayes v. Central Hydraulic Manufacturing Co. Ltd., William F. Lotoski and Gary Lalonde (F. A. Laux, Jan. 9, 1973), the Board found that the complainant had been denied employment because of his race, and then stated:

In this instance, there are no express provisions in the Act requiring a wrongdoer to compensate an individual where the individual has suffered financial loss as a result of wrongfully being denied employment, but common sense and justice would dictate such a right. A victim of an act of discrimination ought to be made whole to the fullest extent possible. Part and parcel of putting a victim into as close a position to that he would have been in had the wrong not been committed may include the granting of a monetary award. (p. 9)

In the cases that followed the change in the empowering section of the Ontario Code to its present form, Boards of Inquiry made rather dramatic changes in their approach to the awarding of damages.

In Leroy Matthew v. Seven City Development Co. Ltd. (Feb. 21, 1973), Professor Tarnopolsky gave approval, at least in principle, to the awarding of general damages. The Board found that the complainant had been denied accommodation

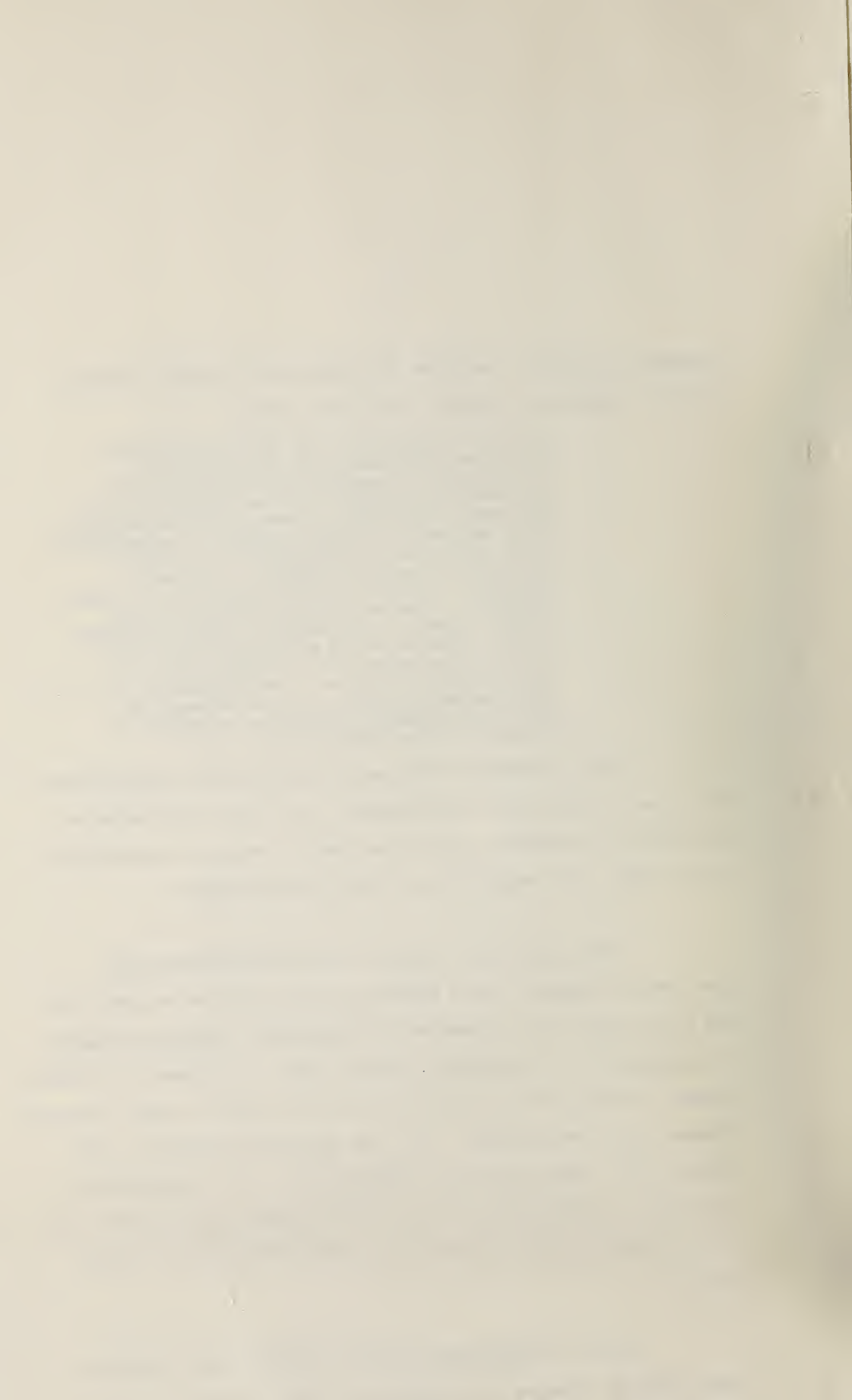
because of his race, awarded the complainant special damages for his additional expenses, and then stated:

When the Legislature of Ontario declared it to be the public policy of Ontario that there be equality of access for all residents of Ontario, it was intended from the beginning that in cases where discrimination be found to have occurred a compensation to a victim of discrimination include not only out of pocket expenses, but some minimal compensation for the injury to human dignity. I do not see how anything less than a letter of apology by (the Respondent) to Mr. Matthew would accomplish this end. It is to be hoped that in preparing and signing such a letter (the Respondent) as the dominant officer in the corporation, might also benefit from the re-educative aspects of the legislation. (p. 8)

Thus, Professor Tarnopolsky decided that compensation for injury to feelings was necessary, but that such compensation might be effected within the general educative parameters of the Code. The compensation needn't be monetary.

Soon after that decision, another Board decided that general damages, in a monetary form, could be awarded for the humiliation that a complainant suffered: Shirley Gabiddon v. S. Golas (S. N. Lederman, July 9, 1973). The Board concluded, however, that it did not have the further power to award punitive damages, for two reasons: (1) The empowering section, (now section 19), refers only to "compensation"; (2) A punishment provision is contained in Part IV of the Code, (now Section 21), which suggests that punishment is beyond the sphere of Board powers.

Since the Gabiddon decision, Boards have tended to award general damages as a matter of course. The following cases demonstrate some of the considerations that go into the determination of the quantum of damages.



In Betty-Ann Shack v. London Driv-Ur-Self (S. N. Lederman, June 7, 1974) the Board found the complainant had been denied employment because of her sex. The Board then cited its own decision in Gabiddon and proceeded to consider the issue of damages:

The first question, then, is whether the discriminating act in question warrants an award of general damages. I think it does. Discriminatory acts against women impose upon them a feeling of inferiority and frustration no less than experienced by other groups. Only the most psychologically conditioned to such treatment would not be sensitive to dehumanizing consequences of being forced to lead severely restricted economic lives. The Complainant, I believe, did experience upset and frustration and accordingly, the Board feels that an award of general damages should be made. Having regard to the fact that the Respondents' conduct was not malicious but was motivated by traditionally held views about women, which unfortunately are still maintained by many in society, \$100.00 is considered to be a proper compensatory award under this head of damages. (pp. 23-24).

Interestingly, the Board considered the respondent's motivation as a factor in determining the amount of general damages. It appears that lack of malice on the part of the wrongdoer went to the reduction of the amount of general damages otherwise to be considered. It is not clear whether the respondent's attitude was indicative of the amount of "upset and frustration" that the complainant suffered, or whether the absence of malice inclined the Board to 'go easy' on the respondent. If the latter is true, it demonstrates that the Board viewed general damages as having a punitive element that could be mitigated by the respondent's good intentions. This question arises in several cases, as will be seen further below.

In another decision of the same Board of Inquiry, Kerry Segrave v. Zeller's Ltd. (S. N. Lederman, September 22, 1975), it was found that the male complainant had been denied

employment because of his sex. In assessing the proper amount of general damages, the Board stated:

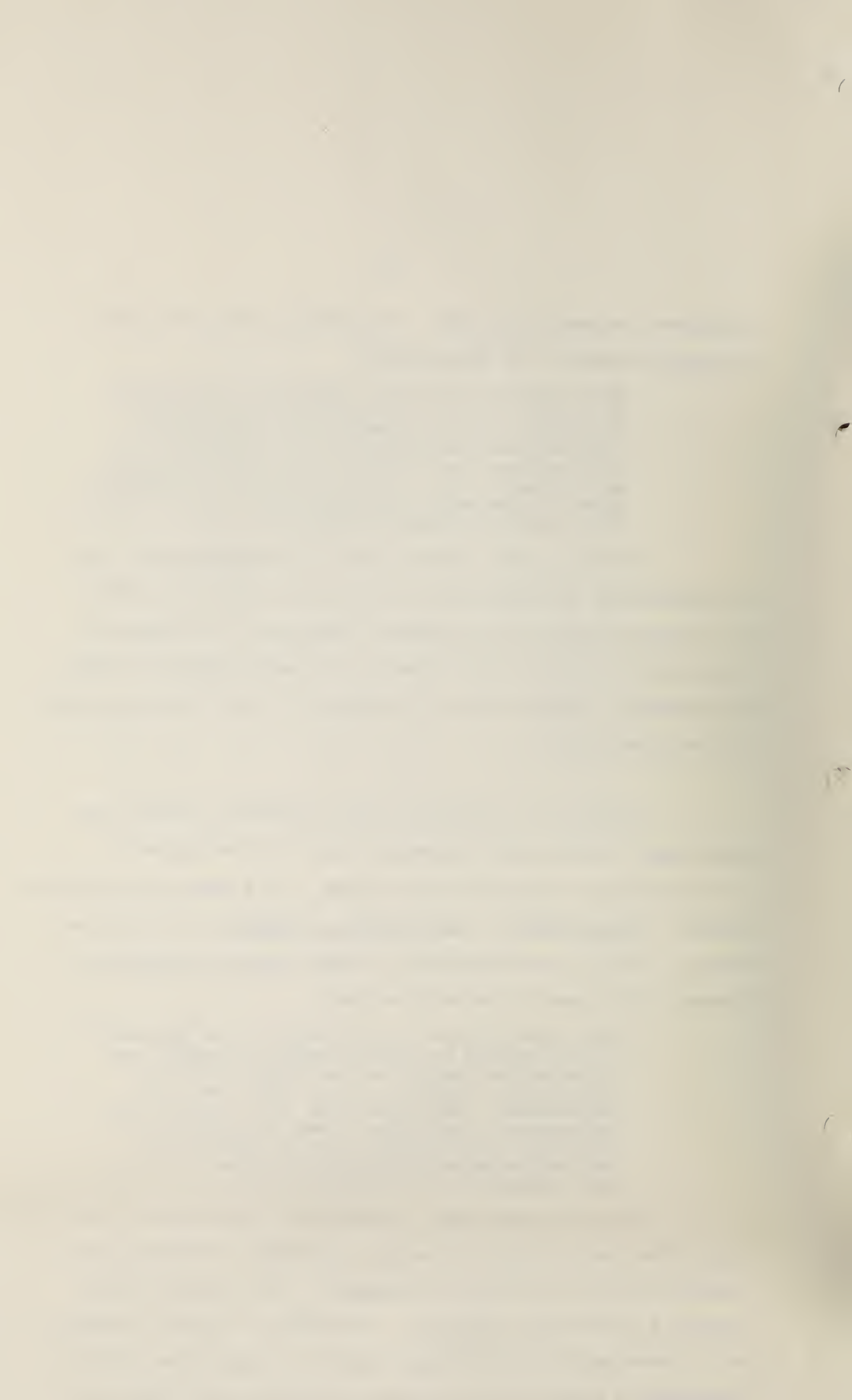
Given the fact that the Complainant is a member of a traditionally regarded majority class - the males - but also taking into account that the discrimination practiced in the instant case was overt and blatant, and considering all the circumstances, an award of \$75.00 represents proper compensation for the insult and humiliation that the complainant suffered. (p. 16)

It is, at least, more clear in the Segrave case that the calculation of damages did not include a punitive element. Yet, without addressing the question squarely, it is possible that some consideration was given to the award that the respondent deserved, rather than to the amount to which the complainant was entitled alone.

Indeed, in a subsequent case decided by, again, the same Board, it was stated expressly that only the degree of the complainant's injury was considered in the awarding of general damages: Minnie Jones v. Mr. and Mrs. C. Huber (S. N. Lederman, June 29, 1976). The complainant had been denied accommodation because of her race. The Board stated:

The relief granted by the Board is not designed to be punitive but merely seeks to rectify any injuries that have resulted because of the Respondent's conduct. It is hoped that the Respondents, upon reflection, will realize the importance of individual human dignity in a civilized society which must be paramount to any narrow personal belief about dealing with one's property as one wishes. (p. 9)

Thus, by this point, Boards were proceeding on the basis that they did have the power, not merely to award special damages for loss of income and expenses, but to award general damages for emotional injuries. The quantum of general damages was to take account of the complainant's circumstances and the respondent's mental state in order to determine the extent of



the complainant's loss. Quite rightly, I think, it was decided that there should be no punitive element in awards of general damages.

However, in some of the cases that followed the decision in Jones, it is apparent that Boards of Inquiry were uneasy about that approach, not so much because they questioned the general damages/punitive damages clarification, but because they questioned the nature of the power to award general damages itself.

In Heather Hawkes v. Brown's Ornamental Iron Works (Professor D. A. Soberman, December 12, 1977), the complainant had been refused employment because of her age and sex. In considering the amount of damages to which the complainant was entitled, the Board stated:

I have examined a number of awards in other violations of the Ontario Human Rights Code, and have come to the view that the primary purposes of awards do not appear to encompass giving full compensation by way of damages as in a civil suit for breach of contract or tort. Rather, they appear to be: to promote the purposes of the Code in encouraging respect for human rights in this province; to provide sufficient liability for violations so that would-be violators of the Code will be discouraged from ignoring it; and to provide a measure of recompense that is considerably more than a token, and that compensates at least in part for monetary loss, and for the pain and suffering and loss of dignity inflicted upon an innocent complainant.

Thus, Professor Soberman was suggesting that full compensation was not the primary consideration in either special or general damage awards. Rather, liability should be measured on a deterrence basis. That is, the quantum of damages awarded against wrongdoers should be "sufficient" to "discourage" future violations. Within the realm of the criminal law, this approach

would be called "specific deterrence". Obviously, if deterrence of the respondent is viewed as one of the "primary purposes" of the Ontario Human Rights Code, then so must punishment and associated criminal law principles be brought to bear in the reasoning of Boards of Inquiry. For example, the state of mind of the respondent must be considered. As the Board in Hawkes concluded:

Accordingly, the award should not be considered punitive; indeed it is held to the amount suggested through concern for the honest but mistaken belief of the respondents that they have not discriminated against the complainant but were acting in her best interests. (pp. 19-20).

Although the Board did not characterize its award as "punitive", it clearly was based on other than compensatory considerations. The respondents' lack of malice brought about a reduction in the amount of compensation to which the complainant was entitled. Presumably, if the respondents' motive was malicious, then the award would have been increased, perhaps even over and above the amount of the complainant's actual loss. Thus, the award was indeed punitive; the Board merely chose, under the circumstances, to impose a mild punishment.

Boards of Inquiry in British Columbia have taken the same approach as in Hawkes: Driediger v. Marshall (Robert Diebolt, May 30, 1977); Foster v. B. C. Forest Products Ltd. (Professor James MacPherson, April 17, 1979). However, as I have pointed out above, the B. C. Code specifically characterizes damage awards as having a punitive character. As such, consideration of a respondent's state of mind is relevant in B. C. to the calculation of the quantum of damages to which a complainant is entitled.

A different approach was taken in another Ontario case: Jahn v. Johnstone (Mary Eberts, September 16, 1977). The Board's reasoning went as follows:

In my opinion a Board of Inquiry has a fair amount of leeway in setting the quantum of general damages before it can be said that the Board has overstepped its functions and taken on the job of "punishing" offending conduct instead of "compensating" its victims. The Legislature has determined that a court may award a fine up to \$1,000.00 if it finds, after a trial, that a breach of any provision of the Code has occurred ... This amount suggests two things. First of all, it is a guide to the level of community disapproval for offences against the standards of behaviour set out in the Code; that level is, by this token, reasonably high. One can keep that in mind when assessing the compensation for injury to dignity that should be paid to a member of the community who has suffered discrimination. Secondly, the amount of penalty exigible after a criminal trial, with its higher standards of proof than those of a Board of Inquiry, does suggest an upper limit on the quantum of general damages which can be awarded without passing from the realm of compensation. (p. 22)

Thus, the Board in Jahn was suggesting that Boards should confine themselves to compensating victims of discrimination and not punish offenders. A guideline for Boards ought to be the amount of punishment that a court could impose under Part IV of the Code.

I am not persuaded that this is the correct approach. It seems to me that if the proper function of Boards of Inquiry is to compensate victims, then Boards should carefully assess the victims' losses and award damages accordingly. The enterprise of punishing offenders relates not to the amount that is awarded but to the reasoning and considerations that underlie the award.

If Boards are limited to purely compensatory awards, then they ought not to consider either deterrence or level of damages, but only the amount of the victim's loss.

While the latter two decisions point out the uncertainty as to what general damages really are, other cases have demonstrated that some Boards were still reluctant to make such awards at all. In Anne Mucilli v. Ed's Warehouse (J. B. Dunlop, July 3, 1979) the Board found that the complainant had been denied employment on grounds of sex and so, awarded damages for loss of income. The Board proceeded to consider whether general damages could be awarded:

General damages for insult may be within the contemplation of the Section as well although, to me at least, this is not so clear, notwithstanding that other boards of inquiry have awarded them. In the law generally damages for injury to feelings are rather narrowly confined and I would be reluctant to find in the language of s.14c an intention on the part of the Legislature to allow them freely. It may be a breach of the Code could constitute a sufficiently wilful invasion of an individual's dignitary interest to justify an award under this head. I do not think that this is such a case. (pp. 4-5)

The Board in Mucilli apparently viewed general damages as being justified, if at all, only where a respondent's behaviour was a "wilful invasion" of a complainant's "dignitary interest". That is, the Board seemed to be of the view that general damages are inherently punitive and to be avoided by Boards of Inquiry.

Another example of an Ontario Board invoking punitive-type reasoning in an award of general damages is Hetty Hendry v. Liquor Control Board of Ontario (Professor D. A. Soberman, August 5, 1980), 1 C.H.R.R. D/160, decided by the same Board that decided the Hawkes case. The complainant had been denied

employment because of her sex. The Board awarded her back pay and proceeded to consider general damages:

She has suffered emotionally as a result of the failure of L.C.B.O. to abide by the Code, and has been insulted as a woman. As the solace available in these circumstances, both to make it clear to Ms. Hendry that her unfair treatment is recognized by this Board and to the L.C.B.O. that it must take very seriously the harm done by failure to abide by the Code, I would award Ms. Hendry the additional sum of \$8,000.00 as general compensation. (p. 27)

There was no evidence that the complainant suffered so much as to warrant such a large award. Further, the Board implied that the award was intended to deter the respondent from future violations of the Code. Those factors, along with the Board's previous statement in Hawkes that full compensation is not contemplated by the Code, would lead to the inference that the awarding of \$8, 000.00 was more than an award of general damages. A considerable punitive element must have been included.

One of the clearest and, to my mind, cogent statements on the power of Ontario Boards to award general damages is contained in Oberto Imberto v. Vic and Tony Coiffure (Professor John McCamus, April 6, 1981), 2 C.H.R.R. D/392. There, the complainant had been refused employment because of his sex. Professor McCamus awarded damages for lost wages and continued:

The complainant has also sought relief in the form of compensation for frustration and mental distress resulting from the discriminatory action of the respondents. Although the law of contract damages has been somewhat reluctant in the past to award compensation for injuries of this kind resulting from breach of contract, there would appear to be no reason why injuries of this kind could not be the subject of compensation under the Ontario Human Rights Code. There is no reason to interpret the phrase "any injury" in Section 14c(d) so as to exclude injuries to an individual's psychological well-being. (D/398)

I agree. The wording of the actual empowering section of the Code must be the starting point for an analysis of the power of Boards of Inquiry to make any orders. Then, a consideration of the ultimate purposes and policies underlying the Code can be resorted to, to flesh out the wording of the statute.

In the previous section I characterized the wording of the Code as "open-ended". I read the empowering section as being worded broadly enough to permit the awarding of general damages, (and perhaps even wide enough to permit punitive awards). As has been seen from the cases, Boards have not always read the Code this way. However, those cases are, by far, in the minority. In most cases, compensation, both in special and general damages, is awarded as a matter of course. There has indeed been a trend away from emphasizing the purely educative aspects of Human Rights statutes toward the granting of compensatory awards.

Section 19 of the Code reads:

19. The board, after hearing a complaint,
 - (a) shall decide whether or not any party has contravened this Act; and
 - (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

A Board may "rectify any injury" or "make compensation therefor". I agree with Professor McCamus, (in Imberto), that those words contemplate the awarding of general damages for psychological injury. I do not, however, see in the particular phrases quoted any conceptual room to make awards

of punitive damages. Rectification or compensation of an injury do not admit of, or incorporate, any sense of punishment of a wrongdoer. I differ then, from the approach of the Board in Hawkes in that I view the mental state of a respondent as being relevant only in so far as it might relate to the degree of injury suffered by a complainant. It ought not to mitigate or augment the compensation payable to a complainant once the degree of injury has been assessed.

I believe that the above interpretation is consistent with the purposes of the Human Rights Code to foster the "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family"... (Code Preamble). The recognition of human dignity implies a right to compensation when that dignity has been offended by a breach of the Code.

(iii) Other Award Considerations

Having concluded that Section 19 authorizes the awarding of compensation for both monetary losses and psychological injury; and that compensation awards ought not to incorporate any punitive considerations, two questions remain to be answered. First, is the power to award compensation completely discretionary? Second, is there an implicit power to award punitive damages by reason of the words of Section 19, "... any act or thing that ... constitutes full compliance"?

(1) Is the power to award compensation completely discretionary?

To repeat, the wording of the Ontario Code is certainly broad enough to permit awards of both special and general damages. Ontario Boards have, for the most part, seen the awarding of general damages as consistent with the purposes of the Code and have made such awards regularly. Some cases have disputed both the power and the nature of general damage awards, but those cases are in the minority.

Given that Boards have the power to award compensation, including general damages, then, is the exercise of that power purely discretionary? There are two cases that are instructive on this issue.

In Foreman et. al. v. VIA Rail Canada, Inc. (Frank D. Jones, Q. C., July 11, 1980), 1 C.H.R.R. D/111, a Canadian Human Rights Tribunal found that the respondent's vision standards were discriminatory on the ground of physical handicap. The complainants had been discriminatorily

denied employment. The Tribunal stated in considering the matter of damages:

Considering all circumstances of this case, I do not think it appropriate to award general damages. The essential remedy is for VIA Rail to comply generally with The Canadian Human Rights Act and to comply specifically with respect to the complainants. (D/117)

The Canadian Human Rights Commission appealed the Tribunal's decision solely on the question of damages. The Commission argued that the Tribunal ought to have ordered compensation for lost wages and suffering. (Under Section 42.1 of the Canadian Human Rights Act S.C. 1976-77, c. 33, appeals from Tribunal decisions may be made to a Review Tribunal).

Subsection 41(2) of the Canadian Act provides:

S. 41.-(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, ... it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) That such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement ..., to prevent the same or a similar practice occurring in the future;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice.

Subsection 41(3) of the Act deals with general damages:

41.--(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

Thus, the issue before the Review Tribunal was whether the initial Tribunal had a discretion not to award damages where the complainants had shown financial loss and emotional injury. The Review Tribunal stated (December 20, 1980, 1 C.H.R.R. D/233):

Although the language used is permissive, it is our opinion that the award of compensation should be regarded as normal in every case where such losses have been incurred. The reason for the permissive language, in our opinion, is to cover situations in which no actual loss has been sustained, or in which such special circumstance would render an award of compensation inappropriate. Since Parliament has indicated the desirability of compensating financial losses resulting from discriminatory practices, it seems only reasonable, in view of the philosophy underlying the legislation, that this should be the norm, applicable except where some good reason for not awarding compensation can be proved. Would it not be ludicrous to interpret a statute designed to eliminate unjustifiable discrimination in Canada as entitling the victims of discrimination to monetary recompense only where they can persuade a Tribunal to make a purely discretionary (and therefore at least potentially discriminatory) ruling

in their favour? It is our view that as in the case of other rights under the Act, those who have suffered financially as a result of discrimination should be entitled to relief as a matter of course, unless compelling reasons for denying compensation can be established by the opposing parties. (D/235)

This strikes me as being a sensible approach in construing the Ontario Code as well. Section 19 of the Code expresses a legislative policy that victims of discrimination may be compensated. As a matter of practice, most Boards, after having found a complaint to be justified, award compensation in special and general damages, almost automatically. This was also the finding of the Review Tribunal in Foreman, after surveying decisions of provincial Boards of Inquiry.

Part of the attractiveness of the Foreman approach lies in the consistency and predictability in damage awards that it would encourage. Extraneous factors, such as the respondent's attitude, could not be weighed by Boards in assessing the quantum of damages to which a victim would be entitled. Complainants' actual losses would be compensated. The Review Tribunal stated the following with respect to the respondent's mental state:

Although we have no doubt as to the Respondent's good faith, we are of opinion that it does not justify a denial of compensation for reduced income resulting from the discriminatory practice. Nowhere in Section 41(2) is there any reference to the motivation or state of mind of the Respondent ... The financial losses suffered by a victim are exactly the same whether the discrimination was committed in good faith or bad faith. (D/235).

It should be pointed out that the Review Tribunal took the same approach with respect to general damages:

We are also of the opinion that the compensation referred to in Section 41(3) should, like

that under Section 41(2), be available as a matter of course where the circumstances to which it refers exist, unless it can be shown that there are good reasons for denying such relief. (D/237).

Thus, the approach in Foreman is at odds with that in Hawkes. In fact, the Review Tribunal in Foreman characterized the Hawkes decision as "simply wrong".

As a conclusion, the Review Tribunal stated:

The root principle of the civil law of damages is "restitutio in integrum": the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses. (D/238)

The Review Tribunal felt that its approach should be the same. (The Respondent has appealed the decision of the Review Tribunal to the Federal Court of Appeal.)

Another important case on this issue, and one that was relied on in Foreman, is Albemarle Paper Co. v. Moody, 422 U. S. 405, 45 L. Ed. (2d) 280, (1975), a decision of the United States' Supreme Court. There, Mr. Justice Stewart characterized the Equal Employment Opportunities Act, 1972 42 U.S.C. s. 2000e et seq. as having two purposes: (1) "prophylactic", the discouragement of discrimination; and (2) "making whole", the compensation of victims.

Assuming those purposes, the Court considered that the awarding of damages, particularly special damages, could not be an entirely discretionary decision:

It is true that back pay is not an automatic or mandatory remedy; like other remedies under the Act, it is one which the courts "may" invoke. The scheme implicitly recognizes that there

may be cases calling for one remedy but not another ... However, such discretionary choices are not left to a court's "inclination", but to its judgment; and its judgment is to be guided by sound legal principles. (422 U.S. 415)

Typically then, based on the Foreman and Albemarle cases, where a complaint has been made out and a loss has been shown, compensation should be awarded, in the absence of special circumstances. This approach is equally consistent with the empowering section of the Ontario Code and its public policy basis. Therefore, I think that a presumption in favour of awarding both special and general damages should be made by Boards of Inquiry. Compensatory awards should not be completely discretionary.

- (2) Is there an implicit power to award punitive damages in the words of Section 19, "... any act or thing that ... constitutes full compliance"?

The relevant portion of Section 19 reads fully:

19. The board, after hearing a complaint,

...

(b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision ...

Boards have, under this broad wording, made creative awards other than compensation. The intent of such awards are typically educative; their aim is the prevention of future violations of the Code.

In the case of Kathy Hartling v. Timmins Police Force (June 22, 1981), 2 C.H.R.R. D/487, I undertook an examination of the types of awards that had been awarded in cases of sex discrimination. Under the heading "Functional Remedies", I stated the following:

In some cases, especially in Ontario and New Brunswick, Boards have required respondents to carry out certain acts in order to impress upon them the importance of compliance and the severity of violations. Such acts include the sending to Commissions of letters expressing respondents' willingness to comply with legislation, sending letters of apology to complainants, posting notices of compliance, etc. (D/499)

Awards of that nature are not confined to sex discrimination cases. They have been made in many cases, regardless of the ground of discrimination.

As an example of another award aimed at ensuring future compliance with the Code, in the case of Sucha Singh Dhillon v. F. W. Woolworth Co. Ltd. (Feb. 12, 1982) I made the following order:

The Respondent shall forthwith constitute an ad hoc Management - Employees Race Relations Committee ... for its warehouse, consisting of an equal number of three groups: a management group, an East Indian employees group, and a non-East Indian employees group, and the said Committee, together with an ex officio member of the Committee appointed by the Ontario Human Rights Commission from its staff shall meet together on company time at least once a month for the next four months, or more often if and when requested by the Commission representative, with the Committee's objectives being, first, to establish effective communications on the general issue of inter-race relations within the warehouse, and second, to suggest to the management of the Respondent such reasonable measures as seem appropriate and necessary from time to time to remove verbal racial harassment from within the Respondent's warehouse, and the Respondent shall implement such reasonable measures as are recommended by the Committee and are feasible from a practical standpoint from time to time.

The purpose of that order was both to educate the affected parties and to implement a structure that might bring about a real change in employment relations. Of course, the ultimate purpose was to bring about such a change as would guarantee future compliance with the Code.

Another type of order that is sometimes made so as to effect "full compliance" (or to "rectify any injury") is reinstatement of an employee who has been discriminatorily dismissed. Such orders are, for obvious reasons, rarely made, yet they are appropriate in some cases where immediate, substantive compliance is desired.

In summary then, a variety of awards have been made under (the present) Section 19; awards that are other than compensatory. Their purpose is to educate wrongdoers and ultimately, to ensure future compliance with the Code.

The question with respect to punitive damages, then, is: are awards of punitive damages consistent with the above purposes? The reasoning of the Board in Shirley Gabiddon v. S. Golas (S.N. Lederman, July 9, 1973)¹ was that punitive damages cannot be awarded under the Code, for two reasons: (1) the empowering section, (now section 19), refers only to "compensation"; and (2) a punishment provision is contained in Part IV of the Code (now section 21), which accordingly implies that punishment is beyond the sphere of Board powers. While I agree with this reasoning as meaning, at the least, that punitive damages certainly should not generally be awarded, I am not certain that it is a proper interpretation of the Code to say they never can be awarded.

¹ Supra at page 33.

In certain cases, it may be highly instructive for a respondent to face the paying of a penalty. If the Board is of the opinion that no other order could be so effective as to encourage future compliance with the Code as a punitive order, then I believe that an order of punitive damages might be proper. Such an award would be consistent with the educative purposes of the Code. It must be pointed out though, that such an award should have as its sole purpose the prevention of future breaches of the Code. That is, the penalty should be made only to effect deterrence, not to denounce the act or wrongdoer, nor to exact retribution. Any aim other than "full compliance" with the Code, ie. deterrence from future breaches, would certainly be, in my opinion, beyond the powers of a Board of Inquiry.

Even if this interpretation is correct, punitive awards would be very rarely made. For most respondents, the mere participation in inquiry proceedings or the awarding of compensatory damages alone will have a deterrent effect. Only where a Board is of the opinion that a greater deterrent is needed would punitive damages be necessary. One can speculate that this might be true in some sexual harassment cases. However, I find that in any event the situation posed in the Inquiry presently before me does not suggest that an exceptional, punitive award, be considered.

In the new Ontario Human Rights Code (Bill 7, Royal Assent December 11, 1981, not yet proclaimed in force) the empowering section (Section 40) provides that where a Board of Inquiry has found a complaint to be justified, it may by order:

- (1) (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000.00 for mental anguish.

The essence of the present Section 19 appears to be preserved in the amended Code. As such, the above reasoning with respect to compensation, general damages, and punitive damages, appears to be equally applicable to future awards under the amended Code. However, the concluding three lines of paragraph 40 (1)(b) leave one with some uncertainty. What precisely is meant by "mental anguish"? Also, is mental suffering caused by discrimination to be compensated for by general damages only in the limited circumstances where infringement of the legislation has been "wilfully or recklessly"? Alternatively, is the principle of full compensation (that we have seen with the present Code) preserved within the language of paragraph 40(1)(a) together with the first two lines of paragraph 40 (1) (b), and the concluding three lines of paragraph 40 (1)(b) intended to allow damages on an additional, punitive, basis, given in a particular situation the aspect of "wilfully or recklessly" coupled with the resulting "mental anguish" (subject to the ceiling of \$10,000.00)? This last interpretation seems doubtful, as the concluding lines of paragraph (b) say that "monetary compensation may include an award" which words refer to the earlier phrase in the paragraph, "including monetary compensation".

We shall now discuss the question of "mitigation".

5. Mitigation of Damages

As was stated above, the presumption in human rights cases ought to be that complainants, if their complaint has been justified, are entitled to compensation for their financial losses. In the absence of special circumstances, only the duty upon complainants to mitigate their losses should offset the amount of damages awarded.

For example, in the case of Mary Gadowsky v. School Committee of the County of Two Hills, No. 21 (John P. S. McLaren, August 13, 1979) aff'd, 26 A. R. 523 (Alta. O.B.), 1 C.H.R.R. D/184, the Board stated:

In my view (the complainant) is entitled to be put in the position she would have enjoyed were it not for the actions of the School authority concerned. (p. 19)

The complainant had been dismissed from her employment as a school teacher because of her age. Included in the calculation of special damages were the complainant's lost wages and pension benefits. The Board found that the complainant had done everything reasonable to mitigate her losses by undertaking substitute teaching. Even so, the total amount of special damages awarded to the complainant was \$72,513.38.

Clearly, the complainants must make more than a minimal effort to minimize their losses. In Shirley Gabiddon v. S. Golas (S.N. Lederman, July 9, 1973), the complainant was denied accommodation because of her race and colour. Because of that discriminatory treatment, the complainant was forced to take a more expensive apartment.

However, the Board was willing to award damages only for a reasonable period during which the complainant "should have made some attempt to extract herself out of the position of renting a two-bedroom apartment." (p. 23)

The Board was not satisfied that the complainant had made adequate efforts to remove herself from the circumstances brought about by the discriminatory act.

In most cases, Boards take great care in calculating the actual amount of a complainant's losses. In Akram Rajput v. Algoma University College (Professor Walter Tanopolsky, May 12, 1976), the complainant had been denied employment as a lecturer in sociology because of his national origin. The Board awarded the complainant damages for six month's lost wages, including pay increases over that period given to other lecturers. The complainant was also compensated for his additional expenses. The Board then considered the complainant's possible future losses:

Because of the fact that it is now getting late to apply anywhere else for the following academic year, and because of the fact that Dr. Rajput has been placed in this position because of action of the respondents, I feel he must have assurance for a further academic year of the salary he would have received for 1976-77 if he had been appointed to the probationary position in July, 1975. Therefore, if he fails to get an academic appointment for next year, which would yield the same salary, after taxes, and if he can satisfy the Ontario Human Rights Commission that he made all reasonable efforts to get such an appointment, he is to be compensated for the difference. (p. 26)

Some complainants make extraordinary efforts to mitigate. For example, in Coutroubis and Kekatos v. Skiavos (Professor E. J. Ratushny, June 16, 1981), 2 C.H.R.R. D/457,

the complainants undertook to work as domestic employees for only \$3.00/hr. between the two of them. The Board found that they had done "everything possible" to reduce their loss.

That degree of effort is not generally expected. In Peter Mitchell v. Nobilium Products Ltd. (Robert W. Kerr, December 2, 1981), the complainant had been dismissed because of his race, colour or place of origin. As a result, he was out of work for about three months. However, the employment that he accepted after that three month period had acutally been offered to him a month earlier. The job was at a lower rate of pay than the position from which he had been dismissed. In considering the complainant's duty to mitigate, the Board stated:

In view of the evidence of the complainant, who bears the onus of proving his loss, I have some hesitation in allowing full compensation to October 1, since he may have been offered alternative employment in September. On the other hand, in view of the reduction in pay, I think he was justified in not immediately accepting such employment. The duty to mitigate is one to act reasonably and it may be reasonable to wait for a better alternative. In light of this, I would find the complainant justified in waiting to October 1, even if he received the other offer in September. (p. 11)

Thus, the duty to mitigate is a duty to act reasonably. It will be a question of fact in each case as to whether a complainant made reasonable efforts to reduce his or her losses. In some circumstances, a complainant needn't take a position at a lower wage immediately, if a better prospect is likely to be found.

There has been some discussion in the cases as to whether Unemployment Insurance benefits ought to be considered in making damage awards. In an Ontario case, Gloria Blackstock v. Norseman Plastics Ltd. (J. B. Dunlop, August 24, 1978), the Board cited sections of the Unemployment Insurance Act S.C. 1970-71-72, c. 48 that impose a duty on recipients of benefits to repay those benefits when they have received an award covering the benefit period. Similarly, there is a duty on persons paying an award to withhold the equivalent of Unemployment Insurance benefits when they know that the person to whom the award is made has a duty to make repayment. In the latter case, the person paying the award is then bound to make the repayment directly to the Receiver-General (Sections 50, 51). the Board in Blackstock set off the complainant's U.I.C. benefits and ordered the respondent to pay the equivalent amount to the Receiver-General.

Other cases have not proceeded in that way. In Donald Berry v. The Manor Inn (W. Bruce Gillis, August 19, 1980), 1 C.H.R.R. D/152, a Nova Scotia Board was of the opinion that Unemployment Insurance ought to be treated the same as other types of insurance:

Under the reasoning in Stead v. Elliott and Caulfield Motors, Ltd. (1963) 39 D.L.R. (2d) 170 it is clear that in our province, insurance payments are not relevant to damage awards and it is clear that in law, if not in practice, Unemployment Insurance benefits are indeed insurance.
(D/154)

Similarly, in Hughes and White v. Dollar Snack Bar (Robert W. Kerr, August 20, 1981) the Board did not set off U.I.C. benefits in calculating special damages:

Although evidence was led that she received \$69.00 per week unemployment insurance benefits during this period, this is a collateral benefit which is not relevant to the dispute between the parties. It may be, for example, that recovery of compensation for lost wages will give rise to a claim for overpayment by the Unemployment Insurance Commission which would upset any calculation taking unemployment benefits into account. (pp. 6-7)

I think that the proper approach is to not take account of Unemployment Insurance benefits in the calculation of special damages. Under the Unemployment Insurance Act, a complainant or a respondent may have an obligation to repay benefits, but that subsequent obligation should not affect the award that a Board of Inquiry may make in the first instance.

We shall now review, as a final topic in respect of damage awards, the quantum appropriate to general damage awards in the particular sphere of sexual harassment cases.

Before doing so, I might mention that I have omitted in doing this review in respect of the general topic of "damages" and "mitigation of damages" any research in respect of one difficult further sub-topic that is of importance. Supposing that discrimination on a prohibited ground is found by a Board, but mitigation by the Complainant has proven impossible, or not without a great lapse of time, and the only appropriate mode of compensation to be considered in giving the Order is by way of damages. For example, hypothetically, an employee is fired from his employment because of a prohibited ground under the Code and he simply cannot find any work elsewhere given his particular circumstances. That is, he has acted reasonably in trying to mitigate, but has not succeeded. Hypothesize further that it is not appropriate or practical in the circumstances to order reinstatement of the employee to his former position. In such a situation, what is the durational extent to which general damages should be ordered in effectuating compensation? There are analogous issues in tort law and contract law, of course, where damages are limited to those reasonably foreseeable to the wrongdoer. It seems to me, at first impression, that these principles are appropriate to awarding general damages under the Code. That is, there is a cut-off point in awarding general damages by way of compensation. I would express this as saying that a respondent is only liable for general damages for a reasonable period of time, a "reasonable" period of time being one that could be said to be reasonably foreseeable in the circumstances by a reasonable person if he had directed his mind to it. That is, what is the duration of time in which mitigation could reasonably be expected to have been achieved

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even though it could not be in the particular situation given the unique, exceptional situation of the aggrieved complainant.

6. General Damages in Sexual Harassment Cases

It remains to consider the proper quantum of general damages in sexual harassment cases. Although the nature of the harassment in individual cases will be the ultimate determinant of the quantum of damages, consideration should be given to the awards made in previous cases.

The Board of Inquiry in Coutroubis and Kekatos v. Sklavos (Professor E. J. Ratushny, June 16, 1981), 2 C.H.R.R. D/457, set out the incident involving the complainant Coutroubis as follows:

The Respondent began to "joke" with Meri Coutroubis about her being too young to have lost interest in boys. (She recently had separated from her husband). At approximately 9:00 p.m., while she was working in the dark room, he entered the room and put his arms around her and tried to kiss her. Although she resisted, he succeeded in kissing her. When she started to scream, he released her and she immediately left for home. As she left, he asked her not to tell anyone and stated that he would not "do it again." (D/457)

The incident involving the complainant Kekatos was as follows:

Shortly after Mrs. Sklavos left for her holiday in Greece, in late July, the Respondent began to speak suggestively to Irene Kekatos with crude jokes and references to her love life. He also began touching her. She responded with angry looks and asked him to leave her alone. On the Monday in question, he approached her while she was working at the typesetter and spoke in a lewd manner. He then grabbed her with his hands on her breasts and bit her cheek. She began to scream, attracting the Respondent's brother who had been in

another part of the building. However, since the door to the room had earlier been locked, he could only knock at the window. The Respondent then stopped and, after some hesitation, gave Irene Kekatos the keys, permitting her to leave. (D/458)

The Commission suggested the amount of \$750.00 as general damages. The Board stated:

...(T)his Board is of the view that such an award is reasonable and, if anything, counsel for the Commission exhibited an appropriate restraint in suggesting this figure. The Complainant Coutroubis was a 17 year old girl at the time of the incident and the Respondent was old enough to be her father. While the Complainant Kekatos may not have been as vulnerable, the attack upon her was more physically aggressive. The evidence indicates that the incidents have had a severe and lasting effect upon the Complainants up to the present time. An award of \$750.00 is not excessive in the circumstances. (D/458)

In the case of Hughes and White v. Dollar Snack Bar (Robert W. Kerr, August 20, 1981), the respondent was not present at the hearing. As such, there was no dispute as to the facts and, as a result, few facts were set forth in the decision. The Board stated with respect to the complainant Hughes' harassment.

Counsel for the Commission asked for an award of \$750.00 to Ms. Hughes for the humiliation and embarrassment she suffered. Such an award is supported by the recent precedent of the decision in Coutroubis and Kekatos and Sklavos ... This amount is rather larger than recent awards for similar loss suffered in cases of dismissal contrary to the Ontario Human Rights Code, where, as here, there is little evidence of actual substantial suffering by the complainant. However, a larger award is justified in cases of harassment because of the ongoing nature of the wrong done to the complainant throughout the period of harassment. In a case of sexual harassment involving physical contact, the appropriateness of a sizable

award becomes even more apparent when it is recognized that each such contact constitutes a trespass to the person. This does not mean that I am attempting to assess damages for such trespass, but merely serves to confirm the seriousness of the wrong suffered by Ms. Hughes. On the basis of the evidence that Ms. Hughes was subjected to repeated such contact for a period of approximately 3 weeks, the requested \$750.00 award is, if anything, conservative. (p. 7)

With respect to Ms. White's damages, the Board stated:

The evidence would suggest that Ms. White was subjected to less extensive harassment by the respondent, if for no other reason that that he appears not to have been present as much during her shifts. On the other hand, in view of the fact that Ms. White was younger (indeed she was still a minor at the relevant time) and was less self-assured than Ms. Hughes, I think it safe to conclude that she suffered as much or more. Even though there was no evidence of substantial suffering, the continuing nature of the harassment over a three-week period and the fact that trespass to the person was involved support a larger than nominal award. This does not mean that I am attempting to assess damages for this trespass, but merely serves to confirm the seriousness of the wrong suffered by Ms. White. Moreover, on at least one occasion, Ms. White suffered actual fear for her safety when the respondent blocked her exit from his office. Again, I think the requested award of \$750.00 is, if anything, conservative. (pp. 9-10)

In the Cox and Cowell v. Jadbritte Inc. and Gadhoke (September 28, 1981), I found that both complainants, and other employees who were not complainants, had suffered frequent, physical harassment by their employer, Gadhoke. I awarded general damages in the amount of \$750.00 to the complainant Ms. Cowell and in the amount of \$1,500.00 to the complainant Ms. Cox:

As for general damages, given the circumstances of the sexual harassment, I think substantial general damages should be awarded for the intimidating hostile and offensive work environment suffered by the complainants because of the discrimination toward them. In this regard, it is clear that Ms. Cox especially suffered psychologically, as known to the individual Respondent. (p. 35)

In Lynda Mitchell v. Traveller Inn (Robert W. Kerr, October 7, 1981), 2 C.H.R.R. D/590, the following sequence of events occurred after the complainant was offered a job with the respondent motel:

The complainant testified that she reported for work the following morning at 7:55 a.m. She spoke to Mr. Czaikowski, who was president and manager of the respondent during the period relevant to this case, and who was working at the respondent's reception desk when the complainant arrived ... There were no customers in the coffee shop adjacent to the office at this hour, however. The complainant asked what she should do, and Mr. Czaikowski, according to her testimony, asked her to go to the backroom with him. She interpreted this request as having a sexual connotation and declined. He advised her that, if she did not, she would not have a job. He also offered to drive her home, suggesting it might be fun. She insisted that he call a taxi for her, which eventually he did, and she left in the taxi. (D/591)

Although there was some dispute as to the facts, the Board concluded that a breach of the Code had been established and proceeded to consider the proper amount of general damages to award:

Counsel for the Commission suggested an award of \$750.00 for the complainant's injured feelings. If damages in such a case were entirely a matter of first impression, I might be favourable to an award in this amount. However, it is desirable (sic) that Boards of Inquiry be consistent in calculating

awards under the Code. In the light of previous awards, I do not think an award of this magnitude can be justified.

...

While the complainant testified that Mr. Czaikowski had touched her upon the hand, there was no evidence she suffered any significant physical assault such as that which led to the awards of \$750.00 in Coutroubis and Kekatos v. Sklavos ... and Hughes and White v. Dollar Snack Bar and Jeckel ... Thus, although this case is like the two last named in that it involved sexual harassment, the injury suffered by the complainant is more in the nature of that suffered by other individuals who were denied employment on discriminatory grounds. There is no basis for a larger award for injured feelings than the \$100.00 awarded in Imberto v. Vic and Tony Coiffure (Ontario Board of Inquiry, McCamus, 1981) ... (D/592)

To summarize then, the following factors have been considered in the awarding of general damages in cases of sexual harassment:

- (i) The nature of the harassment, that is, was it simply verbal or was it physical as well;
- (ii) The degree of aggressiveness and physical contact in the harassment;
- (iii) The ongoing nature, that is, the time period of the harassment;
- (iv) The frequency of the harassment;
- (v) The age of the victim;
- (vi) The vulnerability of the victim; and
- (vii) The psychological impact of the harassment upon the victim.

Conclusion

On the evidence, there is no doubt that the individual Respondent, Francesco Guercio sexually harassed the Complainant. From a factual standpoint, sexual harassment can be said to include:

Unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted;

...or

Implied or expressed threat or reprisal, in the form either of actual reprisal or the denial of opportunity, for refusal to comply with a sexually oriented request;

...or

Sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work.

In my opinion, as set forth in my review of the law, sexual harassment can be a form of sex discrimination prohibited by section 4 of the Code. Specifically, the factual situation of sexual harassment presented by the evidence before this Inquiry is, in my opinion, prohibited by Section 4 of the Code.

The individual Respondent verbally and physically abused the Complainant through his continuing sexual harassment during her employment.

¹Final Report of the Presidential Committee on Sexual Harassment, York University, January, 1982, at p. 2.

Moreover, there was a definite connection between the sexual harassment of the Complainant and the termination of her employment. The Complainant has met the onus of showing that compliance with Mr. Guercio's sexual advances was, in effect, a term or condition of her employment. She was able to halt his advances in the sense that he did not proceed further when rebuffed. However, even though he knew she objected to his sexual advances, he persisted in his attempts and made her subjection to such conduct on his part a term or condition of her employment. When she continued to rebuff him, he chose to terminate her employment.

There is a causal connection in the instant situation between the sexual harassment and adverse employment consequences. The Complainant could only continue to be employed if she subjected herself to sexual harassment, a condition of employment forced upon her because she was a female employee. The sexual advances, in effect, were the cause of termination of the Complainant's employment, because when she continued to rebuff him, he terminated her employment.

The individual Respondent, Francesco Guercio, was in breach of paragraphs 4 (1)(b) and (g) of the Ontario Human Rights Code, in his sexual harassment of the Complainant. He discriminated against her because of her sex within the meaning of those provisions.

The individual Respondent, Francesco Guercio, was the sole shareholder and chief (perhaps only) officer of the corporate Respondent, Royalty Kitchenware Limited.

At all times material to the Complaint and the Inquiry, Mr. Guercio was the President of the corporate Respondent and supervising employee on behalf of the corporate Respondent with respect to the Complainant, and the corporate Respondent, in reality, was the alter ego of the individual Respondent. As Mr. Guercio was the directing mind of the corporate Respondent, it is clear that as a matter of corporate law, the corporation is responsible to the Complainant for the unlawful conduct of its 'directing mind'.

As for general damages, given the circumstances of the sexual harassment, I think general damages should be awarded for the intimidating, hostile and offensive work environment suffered by the Complainant because of the discrimination toward her.

Considering all the circumstances, I think an award of \$1,000.00 for general damages is appropriate in respect of the injured feelings of the Complainant and the pain and suffering she endured by reason of the sexual harassment of the individual Respondent at her place of employment, and in the termination of her employment because she resisted his sexual advances. The harassment in this case was primarily verbal in nature and the Complainant was employed for only three or four weeks. However, there was a significant psychological impact upon her, and she was very

young and vulnerable given her dependency upon the Respondents (as known to the Respondents) for her job, the only real source of income for her family.

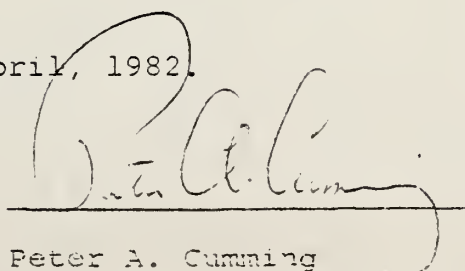
The Complainant had given up her previous job as a waitress to accept the Respondents' offer of advancement by taking a secretarial position, only to realize that she had been hired primarily as an object of possible sexual advantage, and was dismissed summarily when it became clear to the individual Respondent that he would not be successful in his sexual advances.

As well, I am awarding special damages for loss of wages in the amount of \$500.00, representing her lost income for a period of one month. I think this amount to be reasonable in all the circumstances. An employer in breach of the Code should only be liable for loss of wages for a reasonable period of time.

ORDER

1. The Respondents are jointly and severally liable to pay forthwith to the Complainant, Rosanna Torres, the following:
 - (a) As damages for lost wages, the sum of five hundred(\$500.00) dollars.
 - (b) As general damages, the sum of one thousand (\$1,000.00) dollars.
2. The Respondent, Francesco Guercio, shall cease and desist forthwith in the sexual harassment of employees of the corporate Respondent.
3. The Respondent, Royalty Kitchenware Limited, shall do whatever is necessary to ensure that the Respondent, Francesco Guercio, ceases and desists forthwith in the sexual harassment of its employees.

Dated at Toronto this 8th day of April, 1982.



Peter A. Cumming
Board of Inquiry

